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BY
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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τὸ τ'ὀρθῶς ἔχον ὁφθῇ καὶ τὸ
χρήσιμον."—ARIST. *Pol.* II. 1.

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LIEUT.-GEN. THE RT. HON. J. C. SMUTS, K.C.

[*Contributed by* CAPTAIN L. S. AMERY, M.P.]

FEW men of this generation have had a more diversified or more remarkable career than the distinguished lawyer, soldier, and statesman whose portrait appears as the frontispiece of this number. That career, both in its surprising outward changes and in its underlying unity of character and purpose, can only be understood in the light of the history of South Africa and of the position which South Africa occupies to-day as one of the members of the British Commonwealth of nations.

South Africa, far more so than any of the other great British Dominions, or than the United Kingdom itself, is essentially a single homogeneous country. Its compact shape is broken up by no serious barriers whether of mountain, river, or desert. Its twin white races are divided by no profound cleavage of religion or customs which could act as a bar to social intercourse and intermarriage; they live interspersed over the whole of South Africa, while the presence of a great native population always serves as a reminder of the essential community of interests of the white population. Every permanent factor should make for the political unity of South Africa and for the growth of a common South African national feeling. The artificial political division of South Africa in the past was due to historical accidents and misunderstandings, the effect of which all far-seeing South African statesmen or administrators, from Sir George Grey onwards, hoped somehow to see reversed. The only question was under which flag was unity to be achieved, and in the end that question, failing the peaceful adjustment or compromise for which moderate men hoped, was put to the test of force.

The merits of the controversy which led up to the South African War can be left to history. The concrete result was that South

Africa attained the unity for which her best, on both sides, had striven and fought. Under the British flag the Dutch South African enjoys as complete constitutional liberty as any republican flag could have guaranteed, while the British South African can embrace whole-heartedly a South African patriotism which implies no sacrifice of his affection for the Mother Country or of his pride in British achievement the world over. And for South Africa as a whole membership in the community of the nations of the British Commonwealth means a greater measure of real independence and power than can be enjoyed by any small power in isolation—a consideration which the events of the last three years have made far more convincing than it could have been twenty years ago.

Pure Dutch by origin, but the son of a respected member of the Cape Parliament, and himself steeped in the atmosphere of Cambridge and the traditions of English law and constitutional theory, young Smuts when he entered public life seemed naturally destined to play a leading part in that co-operation between Dutch and British South Africans for the building up of a common South African nationality within the framework of the British Empire which in those days was associated with the names of Jan Hofmeyr and Cecil Rhodes. It was under their auspices, indeed, that he made his first public profession of political faith at Kimberley in October 1895. Then came the Jameson Raid, the first lightning flash of the great South African storm—no longer now to be confined by statesmanship or compromise, but destined to run its course to the definite settlement of the issue which had been lurking in the background ever since the setting up of a division of political allegiance in South Africa. Smuts took the side espoused by the great majority of his own people, and when his professional career tempted him up to the Transvaal, and his abilities opened for him an opportunity of political power, he threw in his lot wholeheartedly with the South African Republic. In the final crisis he made an effort to secure a peaceful settlement which might, conceivably, have succeeded if President Kruger had been prepared to stand by it. The war followed, and during its course the lean, ascetic young lawyer discovered himself as a leader of men and a guerilla chief of unequalled resourcefulness and audacity. He was the long-distance raider *par excellence*, and when the peace negotiations came, his quickest

way to rejoin his colleagues was a 500-mile sea voyage to Cape Town and nearly 1,000 miles up country by train.

At Vereeniging the Boer leaders signed a pact which General Botha and General Smuts have since observed in a spirit of loyalty, not merely to the written bond, but to South Africa, for whose sake they fought and made peace. For General Smuts the goal before him was plain: to resume work for the creation of that common South African patriotism which had been the object of his youthful dreams. He steadily set himself to the task, by no means easy, of weaning his own people from "the tendency to look to the ghosts of racialism and sectionalism that have dominated South Africa in the past" and of combating the mischievous idea that the life of South Africa should flow in two separate and rival channels instead of blending into a single stream. His first great opportunity came with the Union movement, in which he played the part of Alexander Hamilton to General Botha's Washington. The establishment of the Union, and his own position in the Union Government as Minister of Defence, brought his keen mind into contact with the problem of Imperial Defence and with the dangers which threatened South Africa as well as Europe from German ambition. The part he has played in the great world struggle since is too well known to need recalling.

There is one feature in General Smuts's intellectual character which is of special interest to the readers of this Journal. That is the extent to which his mind is imbued with the principles of English Constitutional Law,¹ and more particularly with the principle of the undivided sovereignty of Parliament. It was his skilful defence of that principle against Mr. Chamberlain, and against the general feeling of the South African Bar, in Judge Kotzé's case, that first brought him to President Kruger's notice and helped to secure him the Transvaal State Attorneyship. It was his persuasiveness, knowledge, and untiring industry that made the South African Convention abandon all ideas of a federal constitution for South Africa in favour of one deliberately modelled on that of the United Kingdom. To quote his own summing up of that constitution: "One master in South Africa, that is the fundamental idea." It is the same instinct, coupled with his strong South African nationalism, that underlies his opposition to schemes for a closer union of the

¹ In December 1894 the Council of Legal Education awarded to Smuts, J. C., Middle Temple, a special prize of £50 for the best examination in Constitutional Law.

British Commonwealth on federalist lines. But no one knows better than he does that some positive solution must be found to the problem of reconciling the demand of the Dominions for full equality of national status with the United Kingdom with the need for effective unity in dealing with the outside world, in the interests of each Dominion as well as in the interests of that Commonwealth which he has justly described as a League of Nations already in being. And no one is better qualified than he is to assist in the task of finding that solution.

LOCAL SELF-GOVERNMENT IN INDIA.

[Contributed by SIR H. WHEELER, K.C.I.E.]

AT the present moment, when, as the result of the world commotion of the war, it would seem that in many countries a general re-examination of previously accepted methods and systems, whether of administrative or social organisation, is likely to follow the return of peace, it may be opportune to give some account of local self-government in India. For in India this connotes more than the mere local management of matters of local interest. In planning a scheme of local administrative bodies that result was indeed intended, but, along with it, "the association of Natives and Europeans to a greater extent than heretofore in the administration of affairs" ¹ was prominently recognised as one of the objects in view. To quote a later declaration of the Government of India, "It is not, primarily, with a view to improvement in administration that this measure (*i.e.* the extension of local self-government) is put forward and supported. It is chiefly desirable as an instrument of political and popular education." ² An avowed object of British rule in India is the training of the people in the conduct of their own concerns; differences between the Government of India and its critics turn rather upon the pace at which this aim can be achieved than upon the aim itself. To certain sections of educated Indians the present pace appears unduly slow; on the other hand it is contended that progress is as rapid as is compatible with safety. Circumstances arising out of the war have recently accentuated the demand that the pace shall be accelerated, and it is relevant, therefore, to examine (in a few salient aspects only) the extent to which one of the "instruments of political and popular education" has so far proved successful.

¹ Resolution of the Government of India dated December 14, 1870

² *Ibid.* May 18, 1882

Local self-government in India presents three forms : that of municipalities dealing with the affairs of towns ; that of rural boards concerned with the improvement of non-urban tracts ; and that of villages in which authorities of various kinds in varying degrees regulate the business of the smallest administrative unit. To village government it is not now proposed to refer at length ; the Indian village has a history of its own, presenting markedly different features in different parts of the country ; it is not, for the most part, the product of legislative enactment, nor was it an element in the scheme of local self-government as devised in the 'seventies and the 'eighties of the last century for which the term local self-government in the Indian sense now ordinarily stands. It is true that it is thought by many that the foundation of real self-government must be sought in the villages rather than in the artificial creations of British legislatures, and towards the fostering of village life efforts are being made, but its development lies in the future, and the immediate results of local self-government are to be seen in the working of municipalities and rural boards.

These bodies share the characteristic of being exotic institutions of comparatively recent date. In the words of the *Imperial Gazetteer* :

While the Hindus had . . . for many ages a system of village self-government, neither they nor their Muhammadan conquerors succeeded in evolving a local administration such as that which grew up in Europe. Neither the customary rule of the Indian village communities nor the regulations of the industrial castes, which in some respects resemble mediæval trade guilds, ever grew into a true municipal system ; and the accounts which have reached us of the method of town government in Hindu and Muhammadan times show the authority vested not in a representative body of inhabitants, but in the police officers, tax gatherers, and other officials of the Sovereign.

As might be expected, the needs of the Presidency towns of Madras, Bombay, and Calcutta first obtruded themselves upon the notice of the East India Company, and attempts were made to adapt to them the machinery of corporations, mayors, aldermen, and justices of the peace. But outside these towns municipal legislation of a general character was not attempted till 1850, or on any extensive scale till the 'sixties. In rural areas local administration was of later and slower growth. For practical purposes

it was not until 1870 that the delegation of definite financial resources and responsibilities by the Imperial to the Provincial Governments rendered possible and encouraged the development of local taxation to be devoted to local needs under the management of those immediately interested, but even then it was not until the orders of Lord Ripon's Government in 1881-2 that Acts of 1883-4, in the case of municipalities, and of 1883-5 in that of rural boards, established the systems which, in their main outlines, have continued to the present day. Since then there has been much legislation of an amending character, but the framework on the whole has remained unchanged. In judging of results, therefore, it is essential to remember that local self-government in India is not an indigenous nor even a long tried institution.

In the remarks which follow the general plan is to attempt a brief description of the scope, constitution, functions, and resources of municipalities and rural boards respectively, concluding with a general review of the progress achieved and an anticipation of the lines of future development.

Municipalities.—As is well known, the inhabitants of India are essentially rural, finding employment in the staple industry of agriculture. "Only 9·5 per cent. of the population of India are found in the towns, compared with 78 per cent. in England and Wales. Rather more than half the urban population of India is found in towns containing upwards of twenty thousand inhabitants; about one-fifth in towns with from ten to twenty thousand, and the same proportion in those from five to ten thousand; the remainder, about one-fifth, live in towns with less than five thousand. The proportion of the urban to the total population in the main provinces ranges from 18 per cent. in Bombay to 3 per cent. in Assam." ¹ To this it is due that, throughout British India, containing roughly 243 $\frac{3}{4}$ million inhabitants, there are only to be found 713 ² municipalities with a population of rather over 17 million people. Again, in number municipalities show little variation, and that, indeed, towards a decline (from 749 in 1885-6), probably due to the fact that, at the outset, with the laudable intention of extending local management, municipalities were erected in localities which were not truly urban. The supervision of the business of these towns

¹ *Statistical Abstract for British India*, 1913-14, vol. iv. Introductory Note.

² Figures for 1913-14.

was entrusted to 9,753 councillors (the significance of the figure lies in its comparison with the total population), of whom 51 per cent. were elected, 81 per cent. were non-officials, and 88 per cent. Indians. On the other hand, it is only in Madras, Bengal, the United Provinces, Bihar and Orissa, and the Central Provinces that elected members were in a majority, while the two backward provinces of the North-West Frontier and Baluchistan have no elective system, and in Burma it is rudimentary. The electoral franchise is not high, but the percentage of electors to the aggregate municipal population is low. In all municipalities much depends upon the personality of the chairman, and of these the latest figures¹ available show 67 per cent. to be elected and 60 per cent. to be officials.

The functions of Indian municipalities comprise the usual services essential for the health and convenience of town dwellers. They cover the construction and upkeep of roads and public buildings, the lighting and watering of roads, medical relief, vaccination, sanitation, drainage, water supply, measures against epidemics, and education.

To meet these responsibilities their resources are by no means as extensive as might be desired. In 1913-14 their total income amounted to rather over 870½ lakhs² of rupees, and of this the four cities of Madras, Bombay, Calcutta, and Rangoon accounted for nearly 37 per cent. Of the rest, the average income was only Rs. 77,268, or a little over £5,000; excluding sixteen cities with incomes of over 5 lakhs of rupees, the average would be far lower. The sources of income, together with the percentage contributed by each to the total, are as follows:

House and land tax	19'0
Octroi (net)	16'8
Water rate	10'2
Conservancy tax	6'5
Tax on vehicles and animals	2'4
Tax on professions and trades	2'0
Tolls on roads and ferries	1'9
Lighting rates	1'5
Other taxes	3'2
Revenue derived from municipal property (<i>e.g.</i> markets and slaughter-houses) and powers, apart from taxation	16'1
Grants, contributions, and miscellaneous	20'2

¹ Government of India Resolution of April 28, 1915.

² One lakh = Rs. 100,000; £1 = 15 rupees.

They indicate a more complicated scheme of taxation than the simple rates on the value of property in vogue elsewhere. The large proportion of grants and contributions is very noticeable, and these consist for the most part of subventions from the Imperial and provincial exchequers, without which, outside the Presidency towns and Rangoon, it would be difficult to carry out any large schemes of water supply or drainage. In fact, the revenue from taxation proper, exclusive of payments for special services, is comparatively small, and the general incidence of taxation per head of municipal population was only Rs. 3.18, varying in the major provinces (outside the Presidency towns and Rangoon) from Rs. 2.58 in the Punjab to as little as Rs. 1.16 in Bihar and Orissa.

Rural Boards.—As a general statement, subject to local exceptions, it may be said that British India is divided for administrative purposes into revenue districts, sub-divisions, and within them the smaller units of *talukas* and *tahsils*. Consequently, apart from Burma and Baluchistan, which contain no rural boards, local government outside the towns is based upon the district board with subordinate bodies for sub-divisions (in Madras, Bengal, and Bihar and Orissa) or *talukas* and *tahsils* (in Bombay and the Central Provinces). In the United Provinces *tahsil* boards, after trial, were abolished as useless, while in the Punjab they have continued in a few districts only. Assam has adhered throughout to sub-divisional boards only with no co-ordinating body for the whole district. In all India are to be found 199¹ district and 537 subordinate boards, having jurisdiction over 215,000,000 people, and since British India (excluding Burma and Baluchistan) comprises 804,965 square miles, it is obvious that, in area, the charge of a district board is considerable.

The members of these rural boards numbered 16,862, but of these only 37 per cent. were elected. In fact it is only in the United Provinces, Central Provinces, and Assam that the elected members were in the majority,² the percentage of members so chosen ranging from 71 in the Central Provinces to 17 in Madras. Twenty-three per cent. of the members were officials and 93 per cent. Indians. In all provinces except the Central Provinces (excluding Berar) the

¹ Figures for 1913-14.

² The statement is made of each province as a whole; it may be that in individual boards the elected members preponderate.

chairman of the district board was the collector or deputy commissioner, however selected (*i.e.* whether by right *ex officio*, nomination, or election), and in the great majority of sub-district boards, the chairman was usually an official (either the sub-divisional officer or *tahsildar*). The main duties of rural boards comprise "the maintenance and improvement of roads and other communications; education—especially in its primary stages; the upkeep of medical institutions, vaccination, sanitation, veterinary work, the construction and maintenance of markets and rest houses, and the charge of pounds and ferries. They may also be called upon to devote their funds to famine relief, and to cope with plague and other special epidemics." ¹ The total income of the boards (excluding the head of "debt") in 1913-14 amounted to Rs. 737 lakhs, derived in the chief provinces from the following sources:—

Provincial rates	40'9 per cent.
Police	2'4 " "
Education	18'4 " "
Civil works	28'2 " "

The backbone of the revenue of rural boards is a cess upon agricultural land, which is levied, over and above the land revenue, at a rate not usually exceeding $6\frac{1}{4}$ per cent. on the annual rent value, but in recent years grants by Government, particularly for education and sanitation, have formed a most important item on the receipt side, both in the form of direct contributions and of the allocation to the boards of the total proceeds of the land cess which were previously subjected to noticeable deductions in favour of Government for different purposes. In late years, therefore, the resources of rural boards have been materially expanded, though in some instances these bodies have scarcely as yet realised the possibilities of beneficial activity afforded by this new-found affluence.

Below the sub-divisional or *tahsil* board are to be found smaller administrative units, known as village unions, mainly in Madras and to a smaller extent in Bengal. In Bombay and the Central Provinces there also exist local committees constituted under the village Sanitation Acts. The responsibilities of these bodies appertain, however, rather to the subject of village administration, and except in Madras, they can scarcely be said to be of great importance.

¹ Report of the Royal Commission upon Decentralisation.

The Results Achieved.—The facts thus briefly summarised show that the efforts towards the establishment of local self-government have resulted in the creation of an appreciable number of local bodies, the total, however, being still small in comparison with the population of the country; in the personnel of these bodies the Indian non-official element predominates, and while, judged by the Western test of popular election, it is only partially representative, yet it includes a fair selection from the educated land-holding and professional classes, in whose ranks, at the present stage of Indian development, administrative ability is most likely to be found. The superior direction, particularly in the case of rural boards, is mainly in official hands, and, however necessary this may hitherto have been to ensure efficiency, the value of the system as a test of the capacity of the people to manage their own affairs is undoubtedly thereby prejudiced. The functions entrusted to these bodies cover as wide a field as is desirable and expedient at present, and afford ample scope for useful and important work, but the funds at their disposal, especially in the case of municipalities, and even in that of rural boards, looking to the area to be covered, do not suffice for the general initiation of expensive improvements; administration has to be conducted on simple and economical lines, compatible with the income available. Whereas in the West the practice is rather to estimate the cost of the necessary municipal services and then to fix the rates on a scale adequate to meet the expenditure involved, the Indian method is, taking the total sum likely to be produced by the prevailing modes of taxation, to arrange expenditure to the extent only of which the anticipated revenue will permit.

It is the custom of the Indian Governments to review the progress of most important branches of their activities annually, but for the present purpose a reference to the findings of a few more comprehensive inquiries must suffice. In 1896-7 the Government of India conducted such an examination,¹ and recorded their gratification at "the marked advance in (municipal) self-government during the last ten years," while of most of the rural boards satisfactory progress was noted. The Royal Commission upon Decentralisation in 1907-8 heard much evidence regarding local institutions, among other things, and the following extract from their report, though

¹ Government of India Resolutions of October 24, 1896, and August 20, 1897.

primarily relating to rural boards, is applicable to a great extent to municipalities also :

Critics of the present system have dwelt on the failure to develop the principles of election, and on the appointment of official presidents. The boards, it has been urged, have practically become a department of the Government administration. Their work is done by the official element within the boards themselves, or by Government Departments at the boards' expense ; their proceedings are subject to excessive outside control ; and in present circumstances they can never become, as Lord Ripon intended them to be, effective instruments of local self-government.

While we do not go so far in suggestions for change as many who hold these views, we recognise that their assertions contain a large element of truth. At the same time those who expected a complete revolution in existing methods, in consequence of Lord Ripon's pronouncement, were inevitably doomed to disappointment. The political education of any people must necessarily be slow, and local government of the British type could not at once take root in Indian soil. The Resolution of May 1882 itself laid stress on the impossibility of attempting to prescribe hard-and-fast rules of general application, and the actual organisation subsequently developed in the various provinces, with the assent of the Government of India, seems to us to show that the policy of 1882 could not be applied *per saltum*. We recognise, however, that much has already been done to carry out the objects which Lord Ripon had in view, and the added experience of a quarter of a century now renders it possible, we think, to attempt a further practical development of local self-government.

In reviewing the recommendations of the Commission in the light of the comments of local Governments upon them, the Government of India ¹ expressed themselves as follows :

The Governor-General in Council is glad to be assured . . . that the results have, on the whole, justified the policy out of which local self-government arose. The degree of success varies from province to province and from one part of a province to another, but there is definite and satisfactory evidence of the growth of a feeling of good citizenship, particularly in the towns. The spread of education is largely responsible for the quickening of a sense of responsibility and improvements in the machinery. . . . On all sides there are signs of vitality and growth.

These quotations may be enough to establish the general proposition that the policy of local self-government has progressed,

¹ Government of India Resolution of April 28, 1915

and, in fact, it would be strange if this had not been the case. Experience has been gained, and even if the official element is still conspicuous, non-official co-operation in an advisory capacity has taught its lessons. The objects of local government are better known ; the methods by which they can be achieved are more widely appreciated, and the financial position, on which the power to execute actual works of improvement depends, improves, though slowly. That difficulties still remain to be surmounted is inevitable, but their existence does not indicate that the record hitherto has been one of failure.

The weakness of the civic spirit has perhaps been the chief defect of the past. The people are in many ways conscious of their needs, but the determination to seek a remedy at the cost of labour for the common good and pecuniary sacrifice in the form of taxation is often wanting. Good water, healthy surroundings, decent roads, educational and medical facilities are appreciated, especially if at one's own door, but the tendency is to expect these as free gifts from a benign official Providence, and, if one's personal wants are met, to care little for those of one's neighbours. The people at large are slow to insist upon improvements, to change the habits and customs which impede their realisation, and to contribute, each according to his power, towards their cost ; they have still to realise that local government means government by their representatives charged to secure their wishes and conscious of popular support in doing so ; the representatives are not always to be found who will devote time and labour to the public work, irrespective of other considerations. The phenomenon of a community ejecting its local counsellors for scandalous failure to discharge their functions is as yet unknown in India, and, even where the elective system does not prevail, a strong popular sentiment in favour of particularly efficient members could almost make itself felt in the selection of nominees. It is, unfortunately, left to Government to intervene where mismanagement has passed the permissible limit, and its intervention is too often regarded as unfriendly bureaucratic interference.

The second great stumbling-block is that of finance. No progress without taxation is a maxim which has yet to be learnt. Amid much Indian evidence on the subject before the Decentralisation Commission the statement that the development of local self-government would be "hampered" if associated with increased

taxation recurred with remarkable frequency. The central exchequer is still regarded as the appropriate source upon which to draw for anything beyond the routine of municipal administration, while the association of a Government grant with the condition of a local contribution is often resented. It has been said above that popular feeling against individual counsellors is rare, but it is to be feared that an energetic policy involving enhanced rates would rapidly produce it. Yet the existing low scale of local taxation hampers progress on every side.

A third important difficulty in connection with rural administration is the large area of the jurisdiction of many boards. It is easier to excite an interest in the amelioration of a town than of a district. In the one case the advantages are more palpable to all and are shared in to a great extent by all; the conditions of an outlying corner of a district, seldom, if ever, visited by the majority of the unofficial members of a board, are of less direct concern. Again, the more energetic local men are ordinarily to be found at the district headquarters, while attendance at meetings is easier for them than for those who may have to travel from considerable distances. Hence a tendency for the corners to be starved for the benefit of the centre. The point has not escaped attention, and the importance of constituting manageable "local" changes in a geographical sense was insisted upon by Lord Ripon's Government, but in practice adherence to the precept is difficult, and instances have been already cited in which sub-divisional boards have been discarded as of little use. It is undoubtedly easier to secure efficiency in one district board than in several outlying subordinate bodies, but if real "local" sentiment is ever to be stimulated the prestige of the latter must be revived and wider functions and resources must be entrusted to them. The difficulties in so doing are indisputable, and they have been demonstrated by experience as opposed to theory; they are the outcome of the weakness of "local" interest when deprived of stimulus from headquarters, but there is also truth in the criticism that the centralised boards have been reluctant to delegate to the outlying branches responsibilities sufficient to kindle much enthusiasm in their discharge.

Possibilities of the Future.—If it is correct that the record of local self-government in India has been one of considerable progress, which still, however, leaves much ground to be covered before even

a Western standard is attained, it is interesting to speculate what the future may bring forth. Of the three principal deficiencies which have been indicated, the remedying of the first would go far to cure the remaining two. If the civic spirit were stronger, heavier taxation would be accepted with greater alacrity, while smaller bodies could be constituted and trusted to display a competent and energetic interest in their affairs. The essential problem, therefore, is how to encourage the civic spirit, and in its growth time and education are the all-important factors. But at the moment, especially, expression is loudly given to the wish of Indians more largely to control their own concerns, and if any change of method can divert to the wide field of local self-government some portion of this enthusiasm, it behoves Government to do all in its power to utilise it to the fullest extent. It may fall to the lot of a few only to influence the affairs of provinces; a share in the improvement of one's town or district is open to many. In the past the more ambitious sphere has attracted most attention, and there is a tendency to concentrate upon sweeping changes in the political fabric as the prelude to all else; it is more in accordance with the usual course of evolution that an advance should come from humbler beginnings.

For the advancement of local self-government the Royal Commission upon Decentralisation (and in general their recommendations were accepted by the Indian Governments) looked to the expansion of the electoral system, the greater employment of non-official chairmen in municipalities (for rural boards they adhered for the present to the necessity of official guidance), and the gradual relaxation of official control in matters of finance and administration. While recognising that varying local circumstances rendered uniformity of progress impossible, the Government of India held that "these changes will make a real and immediate extension of the principles of local self-government," and it is towards them that events are moving. The impatient reformer is apt to preach the elective system and freedom from official control as the panacea for all defects; the more conservative district official is inclined to seek more evidence of capacity as the preliminary of further concessions. The task of the Government is to draw the line between the forcing of the pace and excess of caution, but that the pace might advantageously be accelerated may be admitted. If success in local self-government is to be a test of fitness for wider self-government, it is

desirable that those who are to be judged by the results should be as free as possible from official leading strings. At present, when the runner stumbles, the strings are liable to be held to blame ; capacity could be better judged if he endeavoured to accomplish the course alone. Stumbles are still to be expected, but he will find his feet in time.

Even were the consequences to be less fortunate, so much will have been gained that the future situation will be clearer. The ready excuse of attributing all deficiencies to the officialisation of local bodies will no longer be possible, and some healthy heart-searching may result therefrom. For the mere concession by Government of greater independence will not ensure success. Unless on the non-official side it is recognised that a policy of confidence must be met with willing effort for the general welfare, progress will be retarded and the public will directly suffer. It is for the popular leaders, by example and precept, to demonstrate that local self-government affords a sphere of usefulness in which no man need be ashamed to work, and further that the labourers are forthcoming in adequate number and of sufficient capacity. As an experiment in self-government the system will then yield results of true value, and can be judged by what it achieves. So far it has necessarily been of a partial character, and the deductions from it are correspondingly obscure ; to some extent it must continue to be partial since it cannot be fully made everywhere ; some parts of the country are markedly more advanced than others, and it would be folly to treat all alike. But, where any reasonable chance of success exists, by all means let non-official enterprise be given a fair trial.

NATIONALITY OF MARRIED WOMEN.

[*Contributed by* G. G. PHILLIMORE, ESQ., B.C.L.]

AMONG the questions which are sure to claim attention when normal times are restored is that of the legal position of women, to whom this present war has given the opportunity of showing their capacity to perform public, commercial, and industrial work of all kinds. The married woman no less than the unmarried may claim recognition of her right, so far as is compatible with the obligation of her married life, to have separate personality from her husband for political purposes, just as she has now with regard to ordinary personal and proprietary rights, and going further, also for international purposes, so as to be able to acquire and divest herself of allegiance to the State of her own accord and be an independent person for family and social purposes. It may be useful at this present time to consider briefly the position assigned to her in (1) public and (2) private international law.

Public International Law: English Law.—As regards the first head, so far as English law is concerned, at common law a woman's nationality was not changed by marriage. By an Act of 1844 a woman married to a natural-born or a naturalised British subject was deemed to be herself naturalised, and to have all the rights and privileges of a British subject, but a woman who was a British subject, marrying a foreigner, retained her British nationality under the common law. By the Act of 1870, which followed on the Report of the Royal Commission on Nationality of 1869, a wife was deemed to be a subject of the State of which her husband is for the time a subject, but a widow who was a natural-born British subject, and had become an alien by or in consequence of her marriage, was deemed to be a statutory alien. So that an alien woman by marrying a British subject became a British subject: a woman British subject

by marrying an alien ceased to be a British subject, and during the marriage the wife followed the nationality of her husband.

If the marriage were dissolved by death—and probably also by divorce—she retained the nationality which she last had till she altered her status by marrying again or by getting herself naturalised. The present governing Act, that of 1914—which gives effect to the recommendation of a Departmental Committee of 1901 and of the Colonial Conference of 1907—modifies this position by enacting that the wife of a British subject is a British subject, and the wife of an alien is an alien, provided that if the husband ceases during marriage to be a British subject, his wife can make a declaration that she wishes to retain British nationality, and thereupon remains a British subject (s. 10). A woman who having been a British subject has by or in consequence of the marriage become an alien, does not cease to be an alien by reason of the death of her husband or the dissolution of her marriage, and a woman who having been an alien has by or in consequence of her marriage become a British subject, does not by reason only of the death of her husband or the dissolution of her marriage cease to be a British subject. A woman who was a British subject previously to her marriage to an alien or whose husband has died or whose marriage has been dissolved, can apply for naturalisation without fulfilling the ordinary requirements of residence in British dominions or service under the Crown. A woman whose husband has died or whose marriage has been dissolved can also control to some extent the national character of her minor children; for the Secretary of State can include in a certificate of an alien who obtains a certificate of naturalisation minor children, on the application of the naturalising parent, born before the date of the certificate, and such a child thereupon will become, if it is not already, a British subject, but it can within one year after its majority on making a declaration of alienage divest itself of British nationality. Besides, the minor children of a person being a British subject who by declaration of alienage or otherwise ceases to be one thereupon cease to be British subjects, unless such a child on that person ceasing to be a British subject does not become by the law of any other country naturalised in that country; provided that where a widow who was a British subject marries an alien, any child of hers by a former husband does not by reason of her marriage

cease to be a British subject, whether residing outside British Dominions or not, but any child so ceasing to be a British subject can declare within one year of majority that he wishes to resume British nationality, and thereupon becomes again a British subject. The minor children of a parent naturalising here are not therefore included automatically in the parent's naturalisation, but application to that effect has to be made by the naturalising parent. A married woman therefore cannot affect her children's nationality unless her marriage is dissolved by death or divorce, because she cannot acquire a new nationality for herself.

A noteworthy change made by the Act of 1914 is that the former naturalisation limited to the United Kingdom is abolished and replaced by an Imperial status, and the effect of the naturalisation is no longer stated to be subordinate to the claims of the foreign State to which the applicant originally belonged when he is within that State territory.

British Dominions.—The Imperial Act of 1914 enables Governors of British Dominions to grant certificates of Imperial British nationality with the consent of the Secretary of State ; but in the case of the self-governing Dominions the power is not to be exercised unless the Dominion legislature adopts this Act, and the Dominion Secretary of State takes the place of the Imperial Secretary of State. The Newfoundland Act 11 of 1915 reproduces the Imperial Act. The Canadian Naturalisation Act of 1914 (No. 44) is the same, except that in the qualifications for naturalisation a knowledge of French is given as an alternative to English. It does not contain the provision in the British Act as to a wife of an alien, herself having been originally a British subject, being able to acquire British nationality without fulfilling the ordinary requirements (s. 2), but it includes this case in the general description of "special cases" in which the Secretary of State can dispense with ordinary requirements in Part III, and it omits the proviso to our s. 10 wholly. The laws of the three Dominions are very similar to our own : *e.g.* New Zealand, No. 5 of 1908 ; South Africa, No. 4 of 1916 ; Australia Act of 1903.

Foreign Systems.—In the foreign systems of law the general rule is that the wife takes the nationality of the husband, whether it be that which he had at the time of marriage or that which he may acquire afterwards, if his national law so provides, *e.g.* Italy

and the Congo State, or if she live in the same country with him (Mexico), or unless her country's law declare otherwise (Japan), and she cannot acquire a nationality for herself, even when judicially separated, *e.g.* in the United States and Holland. Some systems, however, make an exception in favour of a wife who has married a subject of their own, *e.g.* Hungary and Portugal, and if her husband afterwards renounces his nationality and naturalises himself in another country, they allow her to retain their nationality, unless she follows him abroad, *e.g.* Hungary. In Japan, however, the wife of a man losing Japanese nationality also loses it if she acquires her new nationality. Other countries, such as France and Serbia, require reciprocity as a condition of making the wife take her husband's nationality. If the husband reacquires his original nationality, she will generally resume it also, *e.g.* Sweden, but in France she is allowed to opt whether she will do so. If the marriage be dissolved by death or divorce (a judicial separation in Italy), the wife can, in many systems, recover her original nationality by returning to that country and settling herself there (Italy), or if remaining abroad by registering herself with the local consul of that country (United States), or in some cases the permission of the authorities is required (Switzerland). Generally the foreign widow of a subject is considered to retain her husband's nationality until she takes steps to acquire another, *e.g.* Italy, unless she changes her residence abroad. In some systems, she reverts to her original nationality by the fact of the dissolution of her marriage with a foreigner, if that original nationality is her own, as in Hungary and Persia. In France an alien woman marrying a Frenchman acquires French nationality, but the wife of a foreigner who naturalises himself in France does not automatically follow his new nationality, but she can demand it without having to fulfil the condition of probation by the decree which gives this quality to the husband. A Frenchwoman who marries a foreigner follows the status of her husband unless by his national law her marriage does not confer his nationality on her, in which case she remains French. If the marriage be dissolved by the death of the husband or by divorce she can resume French nationality after official authorisation if she resides in France or returns there and makes a declaration that she means to settle there. Upon the dissolution of the marriage by the husband's death, French nationality can be granted

by the same decree of redintegration to the widow and children on her demand.

In Switzerland, as in France, the widow or divorced wife of a Swiss citizen, who has renounced Swiss nationality, and widows or separated and divorced wives who have lost Swiss nationality by marriage, can be readmitted by the Federal Council. There is a similar provision in Japan. In Holland the requisite five years' residence in the Dutch dominions for a grant of naturalisation is waived in the case of a Dutch woman who has married a foreigner, and desires to resume Dutch nationality after the marriage has been dissolved.

In the United States until 1855 the common law doctrine prevailed and marriage did not affect the nationality of the wife. Since then the wife takes her husband's nationality if she is capable of naturalisation by his law. An alien woman who by marrying a United States citizen has taken his nationality, upon the dissolution of the marriage recovers her alien character by marrying a citizen of her former country.

Private International Law.—The nationality of a person is also of considerable importance in private international law, as in the laws of the Continental States of Europe the status of a person in questions which concern the family or social relations—such as legitimacy and adoption when this last is admitted as a legal relationship, the age for majority, the parental power, the alimentary obligation, marriage and its effect on the personality and property of the spouses, and divorce, guardianship, and succession to property on death—is referred to the national law of the parties concerned. Even in countries like Great Britain and the United States, Denmark, etc., which treat domicile and not nationality as the standard for the personal law, nationality is also regarded for certain purposes, and especially in order to prevent prejudice or injustice being done to their own subjects. For the present purpose it will be sufficient, and it seems appropriate, to take marriage as an example. The views of the Continental States on the subject, generally speaking, are to be found in the Hague Conventions on private international law. By the Convention to regulate conflicts of law the right to contract marriage is governed by the national law of each of the spouses unless that law refers expressly to another law, and in order to marry foreigners must show that they are capable of marrying

under their national law by producing a certificate from a proper authority (generally a consul) to that effect. In our law power has been taken by a recent statute—to come into force on a treaty being made between Great Britain or another State to that effect—to enable a certificate of capacity to be obtained by a British subject desiring to be married to a foreigner according to the law of that country and similarly requiring a foreigner desiring to marry a British subject in the United Kingdom to produce a certificate from his authorities that no legal impediment to the marriage exists.

There is a similar recognition of nationality by our law in the case of an exterritorial marriage, viz. a marriage performed in one country between two persons who are not subjects of that country according to the forms of their law before a diplomatic or consular officer of their own country. By the Hague Convention a marriage celebrated before such an officer conformable to the law of his country is to be recognised everywhere as valid in point of form if neither contracting party is a subject of the State where the ceremony takes place, and that State does not forbid it. Such State cannot forbid it in the case of a marriage which by reason of a previous marriage or an obstacle of a religious character would be contrary to its law, but there is a proviso that the State to which the parties belong may refuse to recognise a marriage contracted by its subjects abroad, in violation of its own law, requiring a religious ceremony. Our own Foreign Jurisdiction Act as applied by Orders in Council allows British consuls to perform the marriage ceremony only between persons of British nationality. Again where, as in the case of European settlements in Eastern countries, the local form of marriage is inapplicable, our law allows its own form to be used and recognises such marriage as valid.

In divorce the Hague Convention—while it makes the national law of the spouses the governing law and compliance with that law a necessary condition of the petition—gives exclusive jurisdiction to the Court which is competent by the national law in all cases in which that Court has exclusive jurisdiction by its own law, *e.g.* for religious marriages—yet it gives jurisdiction in divorce to the tribunal of the parties' domicile, as well as to their national tribunal subject to the proviso above noticed. If according to their national law the spouses have the same domicile the Court of the defendant's domicile has jurisdiction. If after cause given

for divorce their domicile be changed or abandoned, the Court of the last common domicile is also competent.

In England, Scotland, and the United States the law of the domicile of the parties at the time of presenting the petition for divorce is the governing law and the Court of the domicile is the proper forum. In the United States the wife can acquire a new domicile for this purpose ; but in our own country the rule has been laid down that the wife cannot have or acquire a domicile separate from her husband. Recent decisions of our Courts however have grafted an exception on this general rule in favour of a wife whose domicile was in England at the time of her marriage. Where the husband (or parent of a husband) who is domiciled abroad has obtained a decree of nullity in the Court of that foreign domicile so that she is debarred from obtaining relief in those Courts, she may be treated as having a domicile of her own sufficient to give the English Courts jurisdiction to entertain a suit by her for dissolution of marriage.¹

Nationality or Domicil to Prevail.—It will be an interesting question in the future whether nationality or domicile will prevail as the standard for the personal law. The present war and the feelings engendered by it will no doubt have an influence in favour of nationality, but it may be doubted whether this will be the most likely to promote the object aimed at in private international law, viz., the assimilation of the municipal rules governing the interrelations of subjects of different States. Any emphasis upon the difference of races is to be deprecated as tending to make the rules for regulating conflicts of law merely municipal instead of international in the sense that a body of law exists which is independent of purely national laws and common to the legal ideals of all the nations.

¹ *Stathatos v. Stathatos*, [1913] P. 46; *De Montaigu v. De Montaigu*, *ibid.* 154.

AIR-SPACE ABOVE TERRITORIAL WATERS.

[Contributed by J. E. G. DE MONTMORENCY, ESQ., M.A., LL.B.]

Two great juristic problems await solution by international agreement after the war, and the solution of these problems is so important to the security of nations and the economic safety of mankind that the agreed solution will need to be supported by the conjoint police forces of the signatory Powers, to the extent of constraining any Power, whether signatory or not, which breaks, threatens to break, or makes preparations that may result in the breaking of, the agreement. These problems are (1) Under-sea traffic, and (2) Air-traffic. It is proposed to deal briefly with one special aspect of the second problem, namely, the question of air-traffic over territorial waters, bays, channels, gulfs, and inland seas.

The Control of Air-space.—First as to the general principles that underlie the question of the Control of Air-spaces. Hugo Grotius in 1609¹ attacked the then wide-spread doctrine that the sea is susceptible of appropriation as property on the ground that the sea is incapable of enclosure and therefore cannot be occupied. John Selden² upheld the current doctrine of appropriation with the limitation that the appropriated waters are also subject to a general right of navigation. Mr. Edward Hall,³ realising that control and not enclosure is the essence of appropriation, laid down a different principle, "Maritime occupation must be effective in order to be valid," and declared that :

This principle may be taken as the formal expression of the results of the experience of the last two hundred and fifty years, and when coupled with the rule that the proprietor of territorial waters may not deny their navigation to foreigners, it reconciles the interest of a particular State with those of the body of States.

¹ *Mare Liberum*, cap. 5.

³ *International Law*, Part II. cap. ii.

² *Mare Clausum*, lib. i. cap. 20.

The present war has shown us Mr. Hall's principle that " maritime occupation must be effective in order to be valid " in operation under war conditions. British control of the North Sea has been effective during the war, and under these circumstances war areas in that sea have been closed to the world. Exclusive control is the essence of appropriation, and the fact that the appropriation is temporary does not make it less proprietary. In Roman law the foreshore was common to mankind,¹ but nevertheless it could become property for the period of effective occupation.² The same principle was true of the sea, and Mr. Hall's position is in fact rooted in Roman law. He specially applies his principle in the case of marginal seas, straits, and enclosed waters. He says, " On the assumption that any part of the sea is susceptible of appropriation, no serious question can arise as to the existence of property in marginal waters." The only doubt is as to their extent. As we shall see directly, that doubt does not exist in the case of the vertical extension of marginal air-spaces. The case of straits, gulfs, and bays, so far as the practice of nations is concerned, no doubt offers more difficulties. With the British abandonment of her large claims, that lasted until 1805 and later, over areas of water surrounding the British Isles, it is possible that claims over British gulfs such as the Queen's Chambers have gone also. But this is by no means clear in the light of the experiences of the present war, though Mr. Hall thought at the date of the publication of his work that the claims would not be made. But whether the claim is nominally or actually abandoned the fundamental principle is the capacity to control, and, as Mr. Hall points out, this is true, not only of gulfs and bays, but also of straits. The right of the free user of straits may be a matter for special arrangement, capable of enforcement, but as Mr. Hall so cogently insists, " it is the power of control and the safety of the State which have alone to be looked to." He adds :

The power of exercising control is not less when water of a given breadth is terminated at both ends by water than when it merely runs into the land, and the safety of the State may be more deeply involved in the maintenance of property and of consequent jurisdiction in the case of straits than in that of gulfs.

¹ *Institutes*, lib. ii. tit. i. 1.

² *Digest*, I. viii. 6.

Mr. Hall finally concludes—that despite doubts as to claims with respect to broad straits and larger gulfs :

There is, on the other hand, nothing in the conditions of valid maritime occupation to prevent the establishment of a claim either to basins of considerable area, if approached by narrow entrances, such as those of the Zuyder Zee, or to large gulfs which, in proportion to the width of their mouth, run deeply into the land, even when so large as Delaware Bay, or still more to small bays, such as that of Cancale.

The Doctrine of Horizontal Sections.—We have to apply these principles to the case of air-spaces over marginal seas, straits, gulfs, bays, and inland seas. I do not propose to enter into or to take the labour to rebut the propositions put forward by certain continental jurists that air-space for the purposes of national control is divisible into horizontal sections. The theory is a new one. The doctrine of private English law, whatever it may mean, *cujus est solum ejus est usque ad cælum* is not Roman law, and can perhaps not be cited in support of the view that horizontal sections are inadmissible. In fact, for purposes of private law the English Courts have largely developed the doctrine of horizontal parallel fee simples in air-space. But, so far as public law is concerned, there is no such doctrine. The Roman State did, in fact, for public purposes claim the air *usque ad cælum*,¹ and there can be no doubt that the English State has a right of eminent domain over all air-space reduced into private control, whether in horizontal sections or not. But the contention that above a certain space territorial air-space ceases is entirely destroyed by the doctrine of effective control, which is, as the war has shown, as applicable to air-space as to sea-space. Control can exist to any height that any foreign air-ship can ascend. For the moment I am not concerned with the question whether the control is effective. The point is that it can be made effective by the application of scientific methods. The use of enemy air-craft in the war shows that, if control in fact disappears, then the nation is even more thoroughly at the mercy of an enemy than if sea control disappears. It is, in fact, an essential of national life that the control should exist, and this fact finally ends the contention that there is a stratum of air which lies above the necessary region of control. As Dr. Westlake pointed out some years ago, the higher the foreign

¹ *Dig.* viii. 2 ; xliii. 24, 22 ; Paulus (c. 228 A.D.) on the Edict, *lib.* 21.

airship flies the greater, by reason of the force of gravity acting on projectiles discharged from the air-ship, is the danger of the land below. Hence the air-space above any of the land of any independent community must be, *usque ad cælum*, territorial air-space under the government of the sovereign power of that community. Probably in view of the events of the war no jurist, not even a German jurist, will be so hardy as to attempt to bring forward any form of the horizontal section doctrine before an International Conference. In any event, it is quite certain that no British Government would entertain for one moment any doctrine of air-space that derogated from the complete sovereignty of the Crown over the entire air-space above the territories of the Crown, including the territorial waters of the Crown.

The Extent of Territorial Waters.—This position will at once raise at the great Conferences after the war the question of the extent of territorial waters. The rule of the three-mile limit, based on the old possible range of gun-fire, is almost certainly doomed. Every nation with a sea border must be able so to control her marginal seas as to be certain that no sudden submarine attack is possible. The coast must be beyond the utmost range of the weapons of the submarine. The three-mile limit will not secure this. Whatever the extension of the territorial waters, that extension will include the extension of the territorial air-space. A nation must exercise control from the air over its territorial waters. The same doctrine applies to gulfs and bays and straits, which are not obviously so vast as to be parts of the Open Sea. Whenever the control indicated by Mr. Hall is exercised a correlative exclusive control over the supervening air-space must be assured.

Control of Straits.—No doubt many difficult problems requiring specific treaty regulation will arise. When a strait, such as the Straits of Dover, is bounded by the territory of independent States, the straits in the interval between the territorial waters will be under the joint control of these States. The convention stating the terms of the control will, of course, provide for the general use, under reasonable control, of the straits, and of the air-space above the straits in accordance with the Common Law of Nations as to the legitimate use by foreign navigators of territorial waters and air-space. But many of the problems as to straits and waterways will require something more than an arrangement between adjacent sovereigns,

and fortunately the precedent of the Danube Commission shows the line of solution. There is, for instance, the question of the connection between the Baltic and the Atlantic. Denmark and Norway, on the principles laid down above, should control the Skager Rack, Denmark and Sweden the Cattegat and the Sound, Denmark the Little Belt. But Russia has an enormous interest in an ice-free passage to the Atlantic. Germany solved her problem by the construction of the Kiel Canal in territory stolen from Denmark in 1864. Russia, as against Norway, Sweden, and Denmark, might claim that she in fact was in a position to exercise air control or sea control, and had therefore a right to share in the uses of these waterways. Germany might make a similar claim. Other commercial nations possessing great sea-power to whom the trade of the vast Baltic area is essential might make similar claims. Indeed in this area the possibilities of conflict between nations capable of striving to secure control by means of Air-power and Sea-power are so acute that it would seem only reasonable that the entrances to the Baltic should be by agreement denationalised so far as rights of transit are concerned, and the control, with adequate police powers, should be placed in the hands of an International Baltic Commission, on which the United States of America and Great Britain would be represented as the chief Sea Powers of the Atlantic. It may well be one of the conditions of peace that the Kiel Canal, with Air-space above it, should also, as territory taken from Denmark in the course of a war of unprovoked aggression by Prussia, be placed under the control of the Baltic Commission. Readjustments on the territorial basis of the *status quo ante bellum* 1804 must operate to some extent in the conclusions of any adequate Peace Conference. A similar commission may have to control the mouths of the Scheldt and the Air-spaces above. German economic control is at least as dangerous as her military control, and to allow military to be succeeded by economic control would undo the labours of the war. The existing treaty arrangements as to the Scheldt have been swept away by Germany. They must be replaced by arrangements that no Power will be able to abrogate. Air control will necessarily play a great part in the enforcement of any such arrangement.

Inland Seas.—The Black Sea, the Bosphorus, the Sea of Marmora and the Ægean offer a problem not dissimilar to that of the Baltic and the adjacent coasts. The sovereign States directly involved

will be Russia, Roumania, the Powers interested in the traffic of the Danube, Bulgaria, and the Powers interested in the government and development of Asia Minor. Before the question arises for settlement the Ottoman Porte presumably will have ceased to be a sovereign Power in Europe. Whatever the future of Constantinople, or indeed of Russia herself, may be, it is certain that the great corn lands of Southern Russia must never again be shut off from the markets of the world, that the waterways between Odessa and the West must never again be closed. These ways may pass under the control of an International Commission itself in effect a sovereign State adequately armed by sea and air to secure that control. If these sea-ways are permanently open the Powers whose territories abut on the Black Sea, following the example of Great Britain and the United States of America with respect to the great lakes of North America, may entirely neutralise those waters. In preserving that neutralisation Air-power would play a leading part. Many other problems relating to the control of the Air-space above marginal waters will arise for solution, and they all really turn on the doctrine of occupation by virtue of effective control. Single nations must protect their own shores and air-frontiers, groups of sovereign nations, with respect to straits, must effect their arrangements by treaties that safeguard the common rights of peaceful transit, under due regulation, of all traders, while peculiar problems that have hitherto resisted solution must be solved by the device of powerful International Commissions. To these Commissions the complete control of the air would be essential for the adequate performance of their work.

THE CIVIC POSITION OF WOMEN AT COMMON LAW BEFORE 1800.

[Contributed by MISS ROSE GRAHAM, F.R.HIST.S.]

AN appeal to history is often a weapon in the armoury of advocates and opponents of wider opportunities for women as citizens, but it is dangerous to make use of it without verifying references, for sometimes erroneous statements are drawn from obsolete authorities.¹ It is well known that in the Middle Ages there were certain hereditary grand serjeanties which could be served by deputy, and that women were able to carry these to their husbands and transmit them to their heirs.² For instance, Isabella de Fortibus, Countess of Albemarle and Devon, held the office of hereditary Chamberlain of the Exchequer for a few years in the reigns of Henry III. and Edward I.³ But the civic position of women landowners and occupiers is an obscure problem, and it is very interesting to discover what share they were able to take in the administration of the county and the parish before the beginning of the nineteenth century.

Sheriffs.—Although the sheriff was afterwards stripped of some of his powers, in the Middle Ages he was governor of the shire under the Crown, captain of its forces, and president of its court. There are several women whose names appear in the "Lists of Sheriffs in England and Wales to 1831."⁴ The office might be served by deputy, and it had been difficult to prevent the shrievalties from

¹ E.g. *Parliamentary Debates, House of Lords*, vol. xxiv. No. 8, pp. 263, 269. *The Times*, March 2, 1917 (letter from Mr. J. H. Round).

² Pollock and Maitland, *History of English Law*, vol. i. p. 483, note 2 (ed. 1898).

³ *Dialogus de Scaccario*, ed. A. Hughes, C. G. Crump, C. Johnson, p. 21; T. Madox, *History and Antiquities of the Exchequer of England*, vol. ii. pp. 296, 297; *Calendar of Charter Rolls*, vol. ii. p. 200; *Red Book of the Exchequer*, ed. H. Hall, vol. iii. 1025 (Rolls Series).

⁴ *Public Record Office, Lists and Indexes*, No. IX.

becoming hereditary; but at the end of the thirteenth century the danger had been generally surmounted.¹

In Westmoreland, however, the shrievalty was hereditary from 1203 to 1850.² It was granted by King John to Robert de Vieux Pont and his heirs,³ and although the inheritance was confiscated when his grandson, Robert de Vieux Pont, fought with Simon de Montfort against Henry III., it was recovered in 1266 for his co-heiresses, his daughter Isabella de Clifford and Idonea de Leyburn, each of them afterwards receiving 66s. 8d. as a moiety of the profits of the shrievalty.⁴ In the record of a dispute with the burgesses of Appleby, the husbands of the co-heiresses Roger de Clifford and Roger de Leyburn are described as sheriffs in fee, but the duties of the office were discharged by a deputy sheriff.⁵ In 1282 Isabella was a widow, aged twenty-eight, with a son and heir, Robert, eight or nine years old; in 1284 Idonea was a widow of twenty-two, with a son and heir, John, three or four years old.⁶ In 1287 Isabella and Idonea sued the burgesses of Appleby in the Court of King's Bench because they attempted to try a murder case in their own court to the prejudice of the Crown and the sheriff.⁷ The burgesses were worsted.

An eighteenth-century MS. with the title *A Summary of the Lives of the Veteriponts, Cliffords, and Earls of Cumberland, and of the Lady Anne, Countess-Dowager of Pembroke, Dorset, and Montgomery*, contains this startling statement about Isabella de Clifford: "And very remarkable it is in the life of this Isabella, that in the time of her widdowhood she had the honour to execute the same office in her own person, and sat herself upon the Bench as hereditarie sheriff of Westmoreland upon trials of life and death, an honour which no woman in this kingdom hath hitherto attained but herself."⁸ The eighteenth-century historians of Westmoreland were

¹ Pollock and Maitland, *op. cit.* vol. i. p. 533; Stubbs, *Constitutional History of England*, ed. 1891, vol. i. p. 295.

² 13 & 14 Vict. c. 30.

³ *Calendar of the Patent Rolls*, 1396-9, p. 344.

⁴ *Ibid.* 1258-66, p. 555; *Calendar of Inquisitions Post Mortem*, vol. ii. p. 291.

⁵ Nicholson and Burn, *History and Antiquities of Westmoreland and Cumberland*, 1777, vol. i. p. 314; cf. *Calendar of the Patent Rolls*, 1266-72, p. 291; *Lists and Indexes*, No. IX. p. 150.

⁶ *Calendar of Inquisitions Post Mortem*, vol. ii. pp. 290, 291, 315.

⁷ Nicholson and Burn, *op. cit.* i. p. 315; cf. *Coram Rege* Roll, No. 103, Public Record Office.

⁸ *MS. Harl.* 6177 f. 13; cf. *Dictionary of National Biography*, Anne Clifford.

more cautious, for they wrote : " It is said that Isabella sat personally in court and executed the office of sheriff." ¹ There is apparently no other source for the statement than the records of the suit brought by Isabella and Idonea against the burgesses of Appleby in 1287, and it had its origin in a misunderstanding. Deputy sheriffs continued to discharge the duties of the sheriff during the life of Isabella.²

Both the sisters were very tenacious of their rights as coheireses, and both of them had sons to inherit their rights. They appear to have disputed about their claim to appoint the deputy sheriff, and it was agreed that Isabella should make the presentation to the treasurer and barons of the Exchequer and Idonea should signify her consent.³ In 1292 Isabella died.⁴ Her son Robert was a minor and a ward of the Crown, and on April 17, 1293, Edward I. gave the shrievalty to Thomas de Hellebeke by reason of the transgression of Idonea de Leyburn in presenting a certain sheriff to the justices itinerant of Appleby, without the consent of Isabella's heir and contrary to the recognised form of presentation to the treasurer and barons of the Exchequer.⁵ From 1298 to 1308 Idonea de Leyburn appears in the lists as joint sheriff with her nephew Robert de Clifford, and they served the office by deputy.⁶ During that time Idonea married a second husband, John de Crumwelle. In 1308, when Robert first began to act as sheriff, her name disappears ; she lived on until 1333, when she died without issue, so her moiety of the shrievalty fell to the Cliffords.⁷

On February 28, 1392, Queen Anne received a grant from Richard II. of the shrievalty of Westmoreland so long as she had the custody of the heir of the late Thomas Lord Clifford.⁸ Eight months later, on November 6, Queen Anne was permitted to grant the shrievalty to Elizabeth, late wife of the said Thomas, with power to appoint an under-sheriff, as the said Thomas and his ancestors were wont to do.⁹ Elizabeth, Lady Clifford, was sheriff until her

¹ Nicholson and Burn, *op. cit.* vol. i. p. 273.

² *Ibid.*; cf. *Lists and Indexes*, No. IX. p. 150.

³ Nicholson and Burn, *op. cit.* vol. i. p. 273.

⁴ *Calendar of Inquisitions Post Mortem*, vol. iii. p. 53.

⁵ *Lord Treasurer's Remembrancer's Memoranda Roll*, No. 64, Public Record Office.

⁶ *Lists and Indexes*, No. IX. p. 150; cf. 31st Report of the Deputy Keeper of the Public Records, p. 354.

⁷ *Calendar of Inquisitions Post Mortem*, vol. vii. p. 392.

⁸ *Calendar of the Patent Rolls*, 1391-6, p. 67.

⁹ *Ibid.* p. 196

son John came of age in 1411, and on his death his widow, another Elizabeth, Lady Clifford, was sheriff from 1422 to 1438.¹ In both cases the ladies exercised the right of appointing a deputy. From 1650 to 1675 Anne Clifford, Countess of Dorset, Pembroke, and Montgomery, held the office of sheriff of Westmoreland in succession to her husband, who, however, had the office in right of his wife.² In Hargrave's notes to Coke's *Institutes* it is stated that she exercised the office in person, and that at the assizes at Appleby she sat with the judges on the bench.³ The statement is repeated in most of the accounts of Anne Clifford, but the earliest source appears to be the note by Francis Hargrave (1741 ?–1821) who gave no authority for it. In Anne Clifford's diary⁴ she mentions year by year the arrival of the two judges for the Northern Circuit at Appleby "to keep the Assizes in the Moot hall"; they lay in her castle of Appleby, one usually in the Baron's Chamber and the other in the best room in Cæsar's Tower. Sometimes she was away at Skipton when they arrived, and in 1653 she wrote: "This was the first time I lay in Appleby Castle when there was an Assize held there."⁵ If there were any foundation for the statement that she sat on the bench with the judges at the Assizes, she would have mentioned it at least once in her diary. In 1650 she wrote: "On December 29 in this year did I sign and seal a patent to Mr. Thomas Gabetis to be my deputy sheriff of the county of Westmoreland for the execution of which office he had the Counsell of State's order for his approbation, bearing date November 21 before."⁶ In her will Anne Clifford described herself as "high sheriffeses (*sic*) by inheritance of the county of Westmoreland,"⁷ and she was the last woman to hold a shrievalty in England.

In Worcestershire the shrievalty was for a time hereditary in the family of the Beauchamps, Earls of Warwick. One widow, Cecily, Duchess of Warwick, appears in the lists of sheriffs from June 5, 1449, until her death on July 26, 1450.⁸

The county of Rutland has had two women among the sheriffs. In 1288 Edmund, Earl of Cornwall, received a grant of the hereditary

¹ *Lists and Indexes*, No. IX. p. 150.

² *Ibid.* p. 151; cf. *Dictionary of National Biography*, Anne Clifford.

³ Coke, *Institutes with Notes by Hargrave and Others*, ed. 1823, vol. ii. p. 326a.

⁴ *MS. Harl.* 6177, ff. 119–206.

⁵ *Ibid.* f. 139.

⁷ *Archæologia Æliana*, New Series, vol. i. p. 11.

⁶ *Ibid.* f. 136.

⁸ *Lists and Indexes*, No. IX. p. 158.

shrievalty of Rutland, which passed to his widow, Margaret, when he died without issue in 1300.¹ Like her husband, she served the office by deputy. In 1309 Edward II. granted the reversion upon the death of Margaret, Countess of Cornwall, of the castle of Oakham and the shrievalty of Rutland to Piers Gaveston, and after his execution in 1312 to his widow, another Margaret, sister of the Earl of Gloucester.² The shrievalty was confirmed to her, when she took Hugh de Audley as her second husband, and their names appear together as sheriffs of Rutland for the first time in 1317.³ Although they were deprived of the office in 1321, they recovered it on the deposition of Edward II. and held it for twenty years, leaving their duties to be performed by deputy.⁴

The shrievalty of Cornwall was given to Queen Isabella in 1317, and she held it until 1330, but the duties were performed by a deputy.⁵

In all these instances women held the office of sheriff either by right of inheritance or in virtue of a grant from the Crown as a source of profit for their lives.

In the early years of the thirteenth century there are two more interesting cases of women who were appointed to the office of sheriff. From the scanty records it is possible to discern that both of them were women of great force of character.

Nicholaa de la Haye, daughter and heiress of Richard de la Haye, brought estates in Normandy and Lincolnshire, and a claim to the hereditary wardenship of Lincoln Castle to her husband, Gerard de Camville.⁶ Gerard was appointed sheriff of Lincolnshire on several occasions during the reigns of Richard I. and John, he held office during the king's pleasure and accounted for the ferm of the shire at the Exchequer for the last time at Easter in 1205.⁷ He died probably in 1215. In the strife between King John and his adherents and Louis of France and the barons who had invited him to England, Nicholaa de la Haye held Lincoln Castle for the

¹ *Victoria County History, Rutland*, vol. i. p. 173; *Calendar of Close Rolls*, 1296-1302, p. 404.

² *Calendar of Close Rolls*, 1307-13, pp. 225, 226.

³ *Ibid.* 1313-17, p. 664.

⁴ *Lists and Indexes*, No. IX. p. 112.

⁵ *Ibid.* p. 21.

⁶ *Archæologia*, vol. xxvii. p. 112.

⁷ *Lists and Indexes*, No. IX. p. 78; *Rot. Litt. Pat.* p. 35b, and *Dictionary of National Biography*.

king.¹ Her gallant defence was long remembered in the city, and it is recorded on the Hundred Rolls that the jurors who were summoned before the justices at Lincoln in 1275 told how, after the death of her husband, Gerard de Camville, the lady Nicholaa de la Haye held the castle in time of war and in time of peace.² After the war the lord king came to Lincoln and the lady Nicholaa went out to the west gate carrying the keys in her hand, and she met the king, and offered him the keys as though to her lord, and said she was a woman of great age, and had borne many labours and anxieties in the castle and could no longer bear such. And the lord king John gently gave the keys back and said, "If you please continue to bear them." King John raised the leaguer of Lincoln on September 22, and on October 18, a day before his death, letters patent were sealed appointing Nicholaa de la Haye and Philip Marc joint sheriffs of the county of Lincoln.³ It was of the utmost importance in time of war that the sheriff should hold the royal castle and thus control the town and the surrounding country.⁴ King John recognised the services of the lady Nicholaa and gave her a strong coadjutor, for Philip Marc was a great soldier, and already held the shrievalties of Nottinghamshire and Derbyshire. On January 7, 1217, the Earl Marshal, as governor of the kingdom during Henry III.'s minority, appointed Geoffrey de Serland to serve as under-sheriff of Lincolnshire under Nicholaa de la Haye.⁵ In the spring the castle was again besieged by a strong force for several weeks, until May 21, when the royalists defeated those barons who still supported Louis of France in the battle known as the Fair of Lincoln. On May 24 the king's uncle, William Longsword, Earl of Salisbury, received a grant of the shrievalty of the city and county of Lincolnshire; it was a lucrative office, and it has been suggested that it was a reward for the earl's return to the royalist party.⁶ But Nicholaa de la Haye was not content to yield up her office to the Earl of Salisbury, who had already secured the marriage of her granddaughter Idonea, heiress of the baronies of de la Haye

¹ Sir James Ramsay, *The Angevin Empire*, p. 497; *The Dawn of the Constitution*, pp. 8, 10.

² *Rotuli Hundredorum*, vol. i. p. 309.

³ *Rot. Lit. Pat.* p. 199b.

⁴ *R. Hist. Soc. Transactions*, New Series, vol. xviii. p. 272.

⁵ *Calendar of Patent Rolls*, 1216-25, p. 20.

⁶ *Ibid.* p. 65.

and Camville for his son William.¹ Moreover Ranulf, Earl of Chester, laid claim to the custody of Lincoln castle, of which Nicholaa believed herself to be the hereditary warden. On October 31, 1217, the Earl Marshal wrote in the king's name to the Earl of Salisbury telling him that Nicholaa de la Haye had come to London as a suppliant to ask that her rights might be restored to her, especially the custody of the castle of Lincoln.² In consideration of her faithful service to the king and his father, her petition was granted. She was to have the custody of the castle and also the shrievalty of the city and county of Lincoln during the king's pleasure. But on this occasion Nicholaa held the shrievalty only for a few weeks, and the Earl of Salisbury again superseded her on December 4.³

It is a singular coincidence that the other great lady who held the office of sheriff under Henry III. was the widow of William Longsword, Earl of Salisbury. Ela d'Evreux was Countess of Salisbury in her own right, and had been given in marriage by Richard I. to his half-brother, William Longsword, in 1198. He held the shrievalty of Wiltshire on several occasions during the reigns of Richard I. and John and from 1218 until his death on March 7, 1226.⁴ But the office was declared not to be hereditary in the family of the Earls of Salisbury, and the grants were "made during the king's pleasure."⁵ On March 23, 1226, Simon de Hal was appointed sheriff of Wiltshire, and the Countess Ela was commanded to deliver Salisbury castle to his keeping.⁶ It is not unlikely that Countess Ela desired to keep the castle and the shrievalty, which she could serve by deputy as the earl had done. She knew of the precedent of Nicholaa de la Haye, and nine months later, on January 22, 1227, the king entrusted her with the custody of the county of Wiltshire during his pleasure.⁷ From 1228 to 1231 John of Monmouth held the office of sheriff and kept the castle. Ela was not content. In 1231 she paid the king a fine of 200 marks to

¹ Bowles and Nichols, *History of Lacock*, pp. 169, 170.

² *Calendar of Patent Rolls*, 1216-25, pp. 117, 118.

³ *Ibid.* p. 130.

⁴ *Dictionary of National Biography; Lists and Indexes*, No. IX, p. 152; *Rot. Lit. Pat.* p. 101.

⁵ Bracton's *Note-Book*, pl. 1235, vol. iii. pp. 248, 249, ed. F. W. Maitland.

⁶ *Calendar of Patent Rolls*, 1225-32, p. 25.

⁷ *Ibid.* pp. 108, 109.

have the custody of the county of Wiltshire and the castle of Salisbury for her life on condition that neither she nor her heirs should be able to claim any hereditary right in the said county and castle ; and in the grant it was stated that the king would not take away the shrievalty from her so long as she conducted herself well and answered for the ferm of the county at the Exchequer.¹ However, she had other strong interests. In 1232 she gave the Carthusians a new home at Hinton, and founded a house of Augustinian canoresses at Lacock in Wiltshire.² On January 3, 1237, she ceased to be sheriff and keeper of Salisbury Castle,³ and in 1238 she became a canoress of Lacock, and was elected abbess of her house in 1240.⁴

There are no other instances of women who have held the shrievalty. The office sometimes devolved upon them in default of male heirs in order that an important and valuable right might not lapse. In most cases they exercised the office by deputy ; in a few others they served jointly with men who were responsible for the work if there was no deputy. No woman was ever elected to the office in any of the towns or chosen for any county in the reign of Edward I., or from 1338 to 1340 during the time when the knights of the shire nominated the sheriffs for the approval of the Lord Treasurer.⁴

Ladies of the Manor.—There is a wealth of evidence in the charters of monastic foundations, in the *Placita de Quo Warranto*, the *Inquisitiones Post Mortem*, and other records to prove that, either by inheritance or marriage, women owned land with its privileges and burdens. They were lords of manors and held some of the hundreds which had passed into private hands. Within the limits

¹ *Calendar of Patent Rolls*, 122532, -p. 431. In the lists of sheriffs of Wiltshire (*Lists and Indexes*, No. IX. p. 152) the name of Ela, Countess of Salisbury, is printed as sheriff in person against the date Michaelmas 1236 instead of sheriff with a deputy as in the previous years. The heading of the Pipe Roll (No. 80) for the previous year is "Ela, Comitissa Sarf Robertus de Plugenay pro ea." The heading of Pipe Roll No. 81 is "Ela Comitissa Sarf de prima iiij parte anni Will. Jereberd de secunda iiij parte ut custos Robertus de Hakesham de ult' di' anni ut custos." The sheriff produced his accounts at Easter and Michaelmas, and Ela was succeeded by William Jereberd on January 3. Under these circumstances the omission of the name of a deputy for three months on the heading of this Roll is insufficient evidence for the statement that Ela acted as sheriff in person (cf. Stopes, *British Freewomen*, p. 43).

² E. M. Thompson, *The Somerset Carthusians*, p. 222 ; Bowles and Nichols, *History of Lacock*, p. 171.

³ *Calendar of Patent Rolls*, 1232-47, p. 172 ; Bowles and Nichols, *op. cit.* p. 181.

⁴ *Lists and Indexes*, No. IX. pp. iii, v.

of a brief article it is impossible to give more than a few instances, but these are examples of many others, not isolated cases. In 1290 Edward I. confirmed a charter whereby Maud Passelewe, one of the heirs of Sir Thomas of Barrow, in Suffolk, in her widowhood gave to Sir William Gifford and his wife Katherine, daughter of the said Maud, her heirs and assigns, all the manor of Barrow with the advowson of the church, the market, fair, mill, and other appurtenances with view of frank-pledge, gallows and other justice and liberties.¹

Agnes de Vescy, second wife of William de Vescy, daughter of William de Ferrers, Earl of Derby and coheiress with her three sisters of Walter Marshall, fifth Earl of Pembroke, held of the king in Dorsetshire the hundred of Hundredsbarrow, in which she had gallows and the assize of bread and beer, *i.e.* the power of enforcing the general ordinance fixing the weight of bread and the price of bread and beer.² In Yorkshire she had gallows and the assize of bread and beer in Malton, and she was negligent in punishing certain persons in the town for breach of the assize.³ In her wood in the wapentake of Pickering she had a court in which persons who felled and carried off timber and killed any of the beasts therein were punished very heavily for trifling offences.⁴

Manorial Rights of Abbesses.—Nunneries received manors, and even hundreds, in their endowments. When Henry II. transferred the nunnery of Amesbury to nuns of the Order of Fontevrault in 1179, he granted his own manor of Wallop, and gave and confirmed nine other manors with all their appurtenances.⁵

In 1286 Edward I. granted a valuable charter of liberties to the prioress and nuns of Amesbury, as his daughter had taken the veil in their house.⁶ In all their lands they should have view of frank-pledge, amends of the assize of bread and beer, pillory, tumbril, gallows, and all the ameracements of all their men, wherever amerced, which would fall to the king, and all the chattels of their men being fugitives or felons, or who after indictment withdrew from justice, and also all money paid for murder. All these the prioress and nuns should levy by their bailiffs, with the right to distrain for them if necessary. The king excluded the sheriff, constable, and all other

¹ *Calendar of Charter Rolls*, vol. ii. pp. 282, 283.

² *Rotuli Hundredorum*, vol. ii. p. 99.

³ *Ibid.* p. 132.

⁴ *Ibid.* p. 107.

⁵ *Calendar of Charter Rolls*, vol. ii. pp. 157-9.

⁶ *Ibid.* p. 331.

officials save those of the forest from the lands and fees of the prioress and nuns, unless they made default, and he gave them the privileges of pleading all pleas of withernam in their own lands and of having the return of all the king's writs.

The legal rights of some of the great abbesses are recorded in the *Placita de Quo Warranto*, the Hundred Rolls, and various inquisitions. The Abbess of Romsey had the hundred of Whorpelsdown in which she held view of frankpledge without the sheriff.¹ The Abbess of Wilton had the hundred of Cawden, and defended her claim before the justices at Wilton in 1281.² The Abbess of Romsey had a gallows on her manor of Romsey by royal grant from the time of King Edgar to the death of Abbess Maud Patrick in 1218 or 1219. After her death the gallows was not used for a long time, as no one was condemned, so the gallows fell down, and the abbess dared not set it up again without the king's leave, and in 1263 a writ was issued to the justices itinerant in Hampshire to hold an inquiry.³ In 1285 the Abbess of Godstow appeared before the judges at Oxford and defended her right to her gallows in the manor of Bloxham and to fines for breaches of the assize of bread and beer.⁴

As owners of property, women had the privileges and profits attached to the holding of courts of hundreds and manors. There is no particle of evidence to justify the statement which has been made by some feminist writers that women presided in these courts. They had their seneschals or stewards, men learned in the law, who held their courts in their name.⁵ Women had no place either on the bench or in the jury-box.⁶ Abbots and other lords of manors and hundreds appointed stewards to act for them, and sometimes allowed the stewardship to become hereditary, and great lawyers accepted it.⁷ There are instances in which an abbot or prior chose

¹ *Calendar of Charter Rolls*, vol. ii. pp. 102, 103; *Select Pleas in Manorial and other Seigniorial Courts*, ed. F. W. Maitland, vol. i. p. 176 (Selden Society); *Bracton's Note-Book*, pl. 775, 1110, ed. F. W. Maitland, vol. ii. pp. 592, 593, iii. 128, 129; *Rotuli Hundredorum*, vol. ii. p. 235.

² *Placita de Quo Warranto*, p. 799.

³ *Calendar of Inquisitions Miscellaneous* (Chancery), vol. i. p. 96.

⁴ *Placita de Quo Warranto*, p. 663.

⁵ E.g. *Calendar of Inquisitions Miscellaneous* (Chancery), vol. ii. p. 49; cf. Walter of Henley's *Husbandry together with an Anonymous Husbandry, Seneschaucie and Robert Grosseteste's Rules*, ed. E. Lamond, pp. 85, 123-5 (R. Hist. Soc.).

⁶ Pollock and Maitland, *History of English Law*, vol. i. p. 485.

⁷ *Ibid.* vol. i. pp. 530, 592; cf. *Memorials of St. Edmund's Abbey*, ed. Arnold, vol. i. pp. 232, 233; *Calendar of Inquisitions Miscellaneous* (Chancery), vol. i. pp. 512, 513.

to hold a manorial court, and often it fell to the cellarer, also a monk, to go round the manors and hold the courts.¹ But this was impossible for an abbess or cellaress. The popes often appointed an abbot or prior to act as judge delegate; there is no instance in which they chose an abbess or prioress.² Records give an occasional glimpse of the steward of an abbess at his work. In the full court of the Abbess of Godstow in 1219 her steward Henry plighted his troth for the abbess and convent.³ John Barill, steward of the Abbess of Shaftesbury, amerced Godiva Pucke in the court of Baieworth for breach of the assize of beer and took from her a shilling.⁴

As owners of land, ladies of the manor and abbesses shared some, but not all, either of the privileges or of the burdens of men. It is clear that sex was a real barrier to direct participation in local government.

Churchwardens.—Women have always been eligible to act as churchwardens. From the thirteenth century, when churchwardens first appear as legal representatives of the parishioners,⁵ until the reign of Henry VIII., they were solely concerned with the ecclesiastical life of the parish.⁶ There is evidence for the belief that they were elected yearly by the whole adult population; in the earliest accounts for Croscombe parish, in which there were guilds of wives and of maidens who gave money to the church, it is noted that the wardens were chosen "by al the parresch."⁷ As women sometimes served the office of warden, it is unlikely that they were excluded from voting. From 1525 to 1546 the churchwardens at St. Martin's-in-the-Fields were elected "by the consent, will and agreement of the whole body of the parish."⁸

In several instances it is known that the women churchwardens

¹ *Memorials of St. Edmund's Abbey*, vol. i. p. 302; *Extracts from Halmote Court Rolls*, 1296-1384, ed. Longstaffe and Booth, pp. xi. xii. (Surtees Society).

² *Calendar of Papal Letters*, *passim*.

³ *English Register of Godstow Nunnery*, ed. A. Clark, pp. 169, 170 (Early English Text Society).

⁴ *Calendar of Inquisitions Miscellaneous* (Chancery), vol. i. p. 356.

⁵ Pollock and Maitland, *op. cit.* vol. i. p. 614.

⁶ *Churchwarden's Accounts of Croscombe*, etc., ed. Hobhouse, p. xv. (Somerset Record Soc.).

⁷ *Ibid.* pp. xi. 6.

⁸ J. V. Kitto, *Accounts of Churchwardens of St. Martin's-in-the-Fields*, p. 585.

were widows. In the parish of St. Petrock's, Exeter,¹ for the year 1428-9, Beatrice Bray presented the accounts with John Edward, and the legacy of Thomas Bray appears therein. In 1514 Joan, widow of William Snyder, presented the accounts with Robert Buller; in the previous year William Snyder was himself junior churchwarden, and, according to the custom of the parish at that time, he would have been senior warden in the next year. In 1426-7 Alice Cooke and Alice Pyppedon presented the churchwardens' accounts. It is singular to find two women serving the office of churchwarden in a parish which, though small in area, was an important one in the life of the city of Exeter, and it may be suggested that one or both of them were widows acting for their late husbands. Two other instances occur of women who presented the churchwardens' accounts in this parish in the fifteenth century, but there is nothing to indicate that they were widows. From 1514 until 1692, when the printed accounts end, no other woman held the office of churchwarden of St. Petrock's.

In the year before her death, 1496-7, Dame Isabel Newton of Claverham Court presented the accounts for the parish of Yatton.² The Newton family were benefactors of the church, but Dame Isabella had been a widow for some time before she was elected, and had paid over the bequest of ten marks left by her late husband in 1489. In 1547-8, the critical years of the religious rising in the west, Lucy Scele appears as sole warden in the small upland parish of Morebath in Devonshire, and in 1554 Jone Morsse, widow, served there with Thomas at Tymewell.³

After the Reformation there was a great change in the parish. The ecclesiastical organisation of church people for their own special purposes was used by the State as the machinery for the discharge of various functions for the civil power.⁴ The general assembly of adult parishioners developed into the vestry, which was a select body; it was under the obligation of imposing compulsory rates for the relief of the poor and various other purposes. Churchwardens' accounts before the Reformation bear witness to the great devotion of all classes of the parishioners to their church, and it is

¹ R. Dymond, *History of the Parish of St. Petrock, Exeter*.

² *Churchwardens' Accounts of Croscombe, etc.*, pp. 116, 120.

³ *Ibid.* p. 218.

⁴ *Ibid.* pp. xv. xvi. S. and B. Webb, *English Local Government, the Parish and the County*. pp. 20-25.

very rare to find a "sett" or compulsory impost to provide funds.¹ But the confiscation of church goods, the destruction of images, and other changes dried up the springs of generosity, and it became necessary to impose a church rate for the maintenance of the fabric. The duties of the churchwardens were far more onerous, and before the end of the sixteenth century fines were imposed on persons who refused the office.²

In the relief of destitution the churchwardens were bound by the later Elizabethan statutes to act as coadjutors with the overseers of the poor, and by several Acts of Parliament they were associated with the constables and surveyors of highways in other business.

The overseers of the poor were appointed by the Justices of the Peace at Quarter Sessions, and were bound to serve until their successors were appointed. Constables were also appointed by the justices, except in places where the old local courts had survived, and the constable was elected by his neighbours. There is evidence to show that in rural parishes in the seventeenth and eighteenth centuries the custom was widely observed of choosing the occupiers of different properties and farms to serve for a year in turn, both as churchwardens and as overseers.³ Even in the sixteenth century there were people who held that women owners of property must serve their turn; Dr. Cox has noted six instances between 1560 and 1561 of women churchwardens in the small Devonshire parish of Kilminster.⁴ In the course of the seventeenth century there were eight at St. Budeaux; in 1645 Widow Farthing and Widow Shatlocke presented the churchwardens' accounts for the Somersetshire parish of Staplegrove.⁵ In the Lancashire parish of Ribchester there are six instances between 1674 and 1795 in which women were elected as churchwardens for particular hereditaments; two of them are described as widows, and in every case they appointed deputies to serve for them.⁶

There were sometimes conflicting opinions as to whether women were liable to serve either as churchwardens or as overseers. Instances occur of women who pleaded their incapacity and of

¹ *Churchwardens' Accounts of Croscombe*, p. xiii.

² J. Charles Cox, *Churchwardens' Accounts*, pp. 5, 6.

³ Webb, *op. cit.* pp. 16-19.

⁴ Cox, *op. cit.* p. 7.

⁵ *Ibid.* p. 7.

⁶ T. C. Smith and J. Shortt, *History of the Parish of Ribchester*, p. 175.

justices who exempted them on that ground, while other men failed to see why women should escape their share of the unpaid work of the community. In 1684 an attorney appeared on behalf of Mary Jaques before the Court of Quarter Sessions at Derby and alleged "that she as a woman was not capable of the office [of churchwarden] nor by law compellable to serve it."¹ The justices ordered Mary Jaques to be discharged from the office and the minister and inhabitants of Wilne to proceed forthwith to a new election. In 1695 the justices at the Derby court of Quarter Session declared that Mrs. Elizabeth Sleigh, being a woman, was incapacitated to serve the office of overseer in the parish of Hartington.² But there were later cases at the same Court of Quarter Sessions in which the justices ignored those precedents and appointed women to the position of overseer as a matter of course.

Overseers.—In 1788 a very interesting case, *Rex v. Alice Stubbs and others*, was tried in the Court of King's Bench.³ Ronton Abbey in Staffordshire was an extra parochial township in which there were only three houses. Mrs. Alice Stubbs lived in the Abbey House and held most of the land, while one of her servants and a labourer lived in the other two houses. The appointment for one year of the three residents as overseers of the poor was confirmed at Quarter Sessions. It was argued that the order of the Court of Quarter Sessions should be quashed because one of the persons was a woman, who was incompetent to serve. On the other side it was argued that in the Act of 43 Elizabeth the only qualification for the office was that of "a substantial householder," and females were not entitled to exemption. The principal duties of the overseers were to collect the poor rates, settle the parish accounts, and provide work for the poor, all of which could be performed by a female. It was said to be the constant practice of women to serve the office, particularly in Staffordshire, when a case of necessity existed. In reply it was argued that a few instances did not establish the liability of females to serve. They had neither strength of body nor the knowledge requisite to make assessments for the relief of the poor, set a value on property, and provide material for work, and moreover it was unseemly for women to make inquiries about bastards, and it might even, if they

¹ J. Charles Cox, *Three Centuries of Derbyshire Annals*, vol. iii. pp. 137, 138.

² *Ibid.*

³ Durnford and Cast, *Term Reports*, vol. ii. p. 395, ed. 1789.

were young, be prejudicial to their morals. The judges decided that there was nothing in the nature of the office that should make women incompetent. In a case cited in which the justices had refused to approve of a woman, they had not acted improperly, for "where there are a sufficient number of men qualified to serve office, they are certainly more proper." The judges held that there was no danger of a general practice of appointing women, "for it is not likely that the justices will approve of such an appointment when there are other proper objects."

In the past centuries sex was no bar either to the office of churchwarden or of overseer, and for that reason no legislation was needed in the nineteenth century to enable women to serve as Poor Law Guardians. Although an exhaustive search among printed as well as unprinted sources would yield more names of women who served as churchwardens and as overseers, it was rare for them to hold office. They usually served in small country parishes; where there was a wide field of choice women were not elected or appointed. No woman served the office of churchwarden in the large town parishes of St. Edmund's, Salisbury, St. Martin's-in-the-Fields or St. Mary-at-Hill, London, St. Mary's, Cambridge, or St. Michael's, Bath.

Constables.—In the case of *Rex v. Alice Stubbs and others*, a distinction was drawn between the offices of overseer and petty constable. It was said that a custom to serve the office of constable by rotation was good, notwithstanding that it might come to a woman's turn, since she was able to procure another to serve for her. The general law, until 1856, was that every township should have a constable, and that it was the duty of every man to serve in turn with no payment except certain lawful fees.¹ It was an unpleasant post, and, as men often filled it by substitute,² it was reasonable that women occupiers should not escape. Dr. Cox has noted three instances of the nomination of women as petty constables in the constabulary papers of Derbyshire.³ In 1649 Humphrey Hurd, constable of Osmaston by Ashburne, presented Elizabeth Hurd for the office next year, as she had a sufficient man to serve for her; but, as her son refused to do this, Humphrey Hurd applied for an order to bring Elizabeth "to the next Justices of the Peace to take

¹ F. W. Maitland, *Justice and Police*, p. 104.

² Webb, *op. cit.* pp. 18, 26-9.

³ Cox, *Three Centuries of Derbyshire Annals*, vol. i. p. 112.

an oath." On April 3, 1649, the constable of Linton presented Elizabeth Taylor, widow, with a written request from the eighteen inhabitants that, as it was the turn of the house in which Elizabeth lived, the Bench would order "that she may officiate and execute the said office according to our ancient custom." In 1683 the justices discharged Clare Clay, widow, who was presented by the inhabitants of Sinfin and Arleston, and they continued the last constable in the office until he should present another more fit person as his successor.

Sextons.—In 1739 a man who was not elected to the paid office of sexton in the parish of St. Botolph without Aldersgate, challenged the right of women to stand for election and to vote. This case, *Olive v. Ingram*, was tried in the Court of King's Bench.¹ The new sexton, Sarah Bly, received the votes of 169 men and 40 women, and her opponent had the votes of 174 men and 22 women. He wished the women's votes to be disallowed, although they were ratepayers, arguing that, although women had freeholds and contributed to all public charges, they could neither vote for members of parliament nor for coroners. The decision of the court was that women were capable of being sextons, and there were many of them in London, and moreover there were offices of greater consequence which had been held by women. As this office was one "which did not concern the public, or the care and inspection of the morals of the parishioners," there was no reason to exclude women ratepayers from the privilege of voting, and moreover no usage for excluding them was stated; so judgment was given against the plaintiff.

In the Middle Ages women had in fact no civic position, and did not participate in person in local administration. However they were not debarred from serving as churchwardens, and in this way other duties devolved upon them. In the sixteenth century, when the State used the officers of the ecclesiastical parish for the discharge of civil functions, the woman churchwarden became bound to act as the coadjutor of the overseer; no legislation was passed to relieve women who were "substantial householders" from filling the office of overseer, though according to custom they might serve by deputy. The question of sex disability or incapacity was sometimes raised both by men and women from motives which are not unknown at the present day, and it was argued in language which is strangely familiar to those who are interested in the enfranchisement of women.

¹ *Reports of Adjudged Cases*, ed. Sir John Strange, vol. ii. p. 1114 (ed. 1795).

EMPIRE LAND SETTLEMENT.

[*Contributed by A. R. UVEDALE CORBETT, ESQ.*]

FOR the past two years the great problem of land settlement for ex-service men has been considered by the various Governments of our Empire. To-day we are able to see the result of this work embodied in the report which has been presented to the Secretary of State for the Colonies by the Committee appointed, at the instance of the Empire Land Settlement Committee of the Royal Colonial Institute, to consider this question under the Chairmanship of Lord Tennyson. In the past there has been no Imperial co-operation in regard to migration from our shores, and the total loss to the Empire from this cause during the last fifty years is incalculable. It is probable that not less than twenty millions of men have thus transferred their energies to lands outside the Empire, and in our struggle for life during the present crisis these extra twenty millions would have proved a powerful addition to our resources.

It may almost be said that we are the one great nation of the world which has not recognised the importance of agriculture in the development of our Empire. This, we hope, is now a thing of the past, as regards both the Home Government and the Governments of the Dominions. One of the great lessons which this War has taught us is that the Empire has never fully realised the strength that lies in co-operation and Imperial Unity. There is nothing which would tend so surely and so effectively to the consolidation of the bonds of the Empire as the co-operation of the various Governments in a great scheme for its economic and agricultural development. The need for British settlers in Canada, Australia, New Zealand, South Africa, and the other possessions of the Crown is well known and must be met, if not by British-born, then by alien peoples. Every effort should therefore be made to create opportunities for those of our ex-service men who desire to emigrate

within the Empire, in order to prevent them from drifting to foreign lands.

This great world upheaval must lead to a flow of emigration from the European countries to various parts of our Empire, and it is natural that British settlers should be given the first chance. But any comprehensive scheme for land settlement must depend for its success on the raising of the capital required to give the emigrant a start. The Dominions have the land and facilities for organising such settlement; but the Home Government no doubt will be prepared to render them the necessary financial assistance without which the available opportunities cannot be turned to full account. The following brief summary will show how far the Governments of the United Kingdom and the Dominions have moved up to the present time.

United Kingdom.—Under the Small Holding Colonies Act, 1916,¹ the Board of Agriculture and Fisheries is empowered to acquire land on lease or option of purchase, for the purpose of providing experimental small holding colonies in England and Wales up to a maximum of 6,000 acres in all, these colonies being primarily intended for ex-service men.

The colonies will be of three different types—mixed farming, dairying, and market-gardening—each colony consisting of a central farm and of a number of small holdings varying in size, but usually not exceeding 50 acres.

Selected applicants without previous experience will be given preliminary training on the central farm, under the supervision of a Director, receiving a fair living wage, until such time as they are considered capable of taking up land for themselves.

Co-operative methods will be adopted for the purchase of requirements and consignment and disposal of produce.

The Government do not propose to make direct advances of capital to ex-service men, but endeavours will be made to establish a system of co-operative credit.

Under the above scheme the following estates have already been acquired :

- (1) Crown Colony, Partington, in the East Riding of Yorks, comprising 2,363 acres of "mixed farming," consisting of a

¹ 6 & 7 Geo. V. c. 38.

central farm and 60 small holdings averaging 35 acres in extent.

- (2) Crown Estate, Holbeach Marsh, in the Southern Division of Lincolnshire, comprising 1,000 acres of "market gardening," consisting of a central farm and 80 small holdings averaging 10 acres in extent.

The Board has under consideration the acquisition of a colony preferably in the southern or western counties, comprising from 1,100 acres to 1,200 acres, and steps are also being taken to acquire an estate in Wales, of about 1,500 acres. The sites of these two colonies have not yet been selected.

Under these four settlements it is expected that provision will be made for some 240 men, or (including their wives and families) some 1,200 persons.

The Board of Agriculture for Scotland is empowered under this Act to acquire an aggregate area of 2,000 acres suitable for experimental and small holdings of which three-fourths shall consist of arable land.

This Act does not extend to Ireland.

Canada.—The Crown lands of Canada are administered by six Governments, the Dominion Government acting for the Provinces of Manitoba, Saskatchewan, and Alberta, and for a part of British Columbia; and the Governments of Ontario, British Columbia, Quebec, New Brunswick, and Nova Scotia for their respective Provinces. The Dominion Government propose to reserve large areas in the three Prairie Provinces to be administered by a Settlement Board and to make free grants of 160 acres of Crown lands to suitable and approved ex-service men. "The classes entitled to participate," says the Report of Lord Tennyson's Committee, "include honourably discharged ex-service men from the Forces of Canada, the United Kingdom, and any of the Self-Governing British Dominions, and to the widows of soldiers and sailors from other parts of the Empire whose husbands died while on active service." The Settlement Board will have power to grant a loan up to £500 to each approved applicant, to be expended as the Board sees fit for necessary equipment. This loan will be a first mortgage on the homestead, advanced at the low rate of 5 per cent. interest, and will have to be repaid within fifteen years. The first payment may be

deferred for the first two or three years at the discretion of the Board. Applicants for land and loans must have previous farming experience before they can be considered eligible; but ex-service men who do not already possess such experience can receive training upon the Demonstration Farms of the Dominion or Provincial Governments, or they can be placed with selected and approved farmers through the existing organisation of the Governments. In either case they would be employed at the current rate of wages.

Ontario.—Under the Act No. 150 of 1916 the Government grant free to ex-service men from the Canadian forces, the forces of the United Kingdom and the Self-Governing British Dominions, 160 acres in what is known as the "Clay Belt" in the northern part of the Province. Assistance up to £100 by way of a loan, bearing interest at 6 per cent. and repayable within ten years, can be obtained from the Provincial Government. For those with no agricultural experience it is proposed to provide training and community settlements. The training dépôt at Monteith provides living accommodation and board during instruction, and a reasonable wage will be paid. When a sufficient number of men are trained a Colony will be established, farms of 80 acres, of which 10 acres will be cleared, will be granted free and a loan up to £100 advanced for machinery, stock, etc., repayable over twenty years. Co-operative methods will be adopted; the social side of life will be provided for, and provision will be made for married men to have their families with them at as early a date as possible.

British Columbia.—The British Columbian Act,¹ passed in 1916, provides settlement for ex-service men who have lived in British Columbia and served in the Canadian forces, or the forces of any other part of the Empire, and who return to a domicile in British Columbia, including widows of men who would have been entitled to benefit under the Act. It is believed to be the intention of the Provincial Government "to extend to all United Kingdom ex-service men and their families advantages as regards land settlement and otherwise similar to those we give to our returned Canadian soldiers," as promised to Sir Rider Haggard by their predecessors. Ex-service men can obtain on payment of £2 a pre-emption claim to land, the area and provisions of residence to be fixed by regulation; it will be free of all taxation except school taxes. A fund

¹ 6 Geo. V. No. 59.

from the sale of Crown lands will be available for making loans to returned soldiers to be used for improvements on their pre-emptions, etc. This fund will be administered by the Agricultural Credit Commission of British Columbia.

Quebec.—No new legislation has been passed in this State for the settlement of ex-service men from Canada or other parts of the Empire, but the facilities under the ordinary law are open to them. Lots of 100 acres at £6 per lot are offered, payment to be made in five years, during which time the settler must reside on his holding, build a house (to be completed in the first eighteen months), erect a barn, and clear 15 acres. The Government will help new arrivals in obtaining work on farms to enable them to get accustomed to the climate and acquire the necessary experience.

New Brunswick.—Under the Act passed in 1916,¹ the Provincial Government was authorised to develop a scheme for the settlement of residents of New Brunswick and of the United Kingdom who have served the Empire in the present war on suitable lands in the Province. The scheme is to be carried out by the Farm Settlement Board of the Province,² working in conjunction with an Advisory Settlement Board appointed for the purpose. An area of 20,000 acres has been set aside to establish community settlements, each of which will accommodate from 100 to 250 families, where a demonstration farm will be established to provide teams and implements available for hire. A church, public hall, school, etc., will also be erected. Radiating from this centre will be farms from 10 to 100 acres each, according to the distance from the centre. The cost of these will vary; if they are Crown lands, the price will be governed by the actual cost of improvements (*i.e.* clearing, well-boring, and the erection of a small house, etc.), estimated at from £100 to £300. If they are on lands resumed by the Government, the cost of resumption must be added. The conditions of occupation are a payment of 10 per cent. of the cost on application, and the balance spread over twenty years. Settlers must reside six months of each year on their farm and cannot transfer their rights without the approval of the Advisory Settlement Board. Capital of £100 to £300 is very desirable but not essential. Employment will be found for men without capital on farms in the Province, and until the scheme is

¹ 6 Geo. V. No. 9.

² Appointed under the Act 2 Geo. V. No. 28.

developed, ex-service men desirous of participating can obtain employment in preparing the holdings.

Nova Scotia.—No special legislation has yet been passed, but the Provincial Government is prepared to give the matter consideration when the policy of the Dominion Government has developed. Most of the Province has already been settled, and there is comparatively little Crown land available, but there is a large number of farms, owned by private individuals, which are now being offered for sale. The Government will advise intending settlers in selecting land and make advances up to £500 on the appraised value secured by mortgage.

Australia.—The Crown lands of Australia are all under the control of the State Governments, with the exception of those in the Northern Territory and the site of the Federal capital. The State authorities are working in conjunction with the Commonwealth Government to deal with the question of settlement throughout Australia. Legislation has already been passed in the various States.

New South Wales.—Under the Returned Soldiers' Settlement Act, 1916,¹ certain areas of Crown land and resumed private estates have been set aside for the settlement of returned Australian soldiers. The State Government has promised to extend these advantages, under certain limitations, to discharged British soldiers, and has already undertaken to provide a thousand farms on the Yanco Irrigation Area for which British soldiers who have been engaged in the war will be given preference. The size of these farms varies from 2 to 250 acres, the average being about 50 acres. The tenure will be perpetual lease, and the rent $2\frac{1}{2}$ per cent. of the capital value, besides water-rent. The Government may suspend for such periods as it thinks fit payment of money due for (a) rent, (b) water charges, (c) improvements, and (d) instalments of purchase money. The Government Savings Bank of New South Wales will advance money up to three-quarters of the value of the holder's interest in improvements. The Government has offered equal opportunities for British and Australian soldiers seeking Government employment.

Victoria.—A Bill indicating generally the policy of the Government has been introduced into the State Parliament. The ad-

¹ No. 21 of 1916.

vantages given to Australian soldiers will be extended to ex-service men of the United Kingdom on approved selection in England. The settler pays a deposit of 3 per cent. on the capital value of the land, with subsequent payments of 6 per cent. per annum for thirty-one and a half years to cover interest and purchase money. Ex-service men will not be required to pay a deposit, rent, or fees for the first three years. Advances will be made up to 70 per cent. of the value of improvements with a maximum of £500. Certain agricultural experience under local conditions will be required before taking up land.

Queensland.—The Discharged Soldiers' Settlement Act, No. 32 of 1917, provides facilities for settlement, not only to ex-service men of the Commonwealth, but to men of the United Kingdom and its Allies, and of any of His Majesty's Dominions who have served during the war and received honourable discharges, and extends these offers to the dependants of such ex-service men. Crown lands and land resumed by the Government will be offered for settlement in "perpetual lease" selections. No rent is payable during the first three years of the term. The survey fee is payable in ten equal annual instalments without interest, commencing at the fourth year of the term. From the fourth to the fifteenth year the annual rent will be $1\frac{1}{2}$ per cent. of the capital value of the land, and the annual rent for each succeeding period of fifteen years is to be determined by the Land Court. The lease will contain provisions as to residence and the making of improvements. The size of holdings varies: for poultry farms 10 acres, fruit farms 25 acres, general farming 100 acres, and dairy farms up to 1,280 acres. On Crown lands the average price will be 25s. per acre, and on resumed areas the value will depend on the amount of compensation paid to the original holder for resumption.

Advances not exceeding £500 may be obtained from the Government Savings Bank for preparing and stocking of farms and the erection of buildings, these advances being repayable over forty years in annual instalments. In the case of Crown lands the rate of interest for the first year is 3 per cent., for the second year 4 per cent., and there is an increase of half per cent. each succeeding year up to a limit of 5 per cent.

South Australia.—The Returned Soldiers' Settlement Act¹ of

¹ 6 Geo V No 1226

1915 and an amending Act of 1916¹ only make provision for returned Australian soldiers: the State proposes, however, to bring in further legislation under which ex-service men from the United Kingdom and other parts of the Empire may equally benefit. The holdings will vary in size, according to the purpose for which the land is suitable, and liberal advances will be given on improvements, the repayment for these, and for the purchase money, to be spread over a number of years on easy terms.

Western Australia.—The Government are reserving land in the "Wheat Belt" and in the south-west for selection by all persons who have been on active service in His Majesty's naval and military forces, and their dependants. In the "Wheat Belt" 160 acres are granted, subject only to the payment of the survey fee and any preliminary improvements, the repayment for which may be spread over thirty years. The settler may also purchase a further area up to 840 acres at 15s. per acre, 1,000 acres being considered the minimum size for a wheat farm. A capital of £500 is advisable, but some of this can be borrowed from the Agricultural Bank. The settler must reside on his holding and execute certain improvements each year. In the south-west 160 acres may be selected on the same terms. It is also proposed that settlements should be formed in this area of fifty settlers, each holding 40 acres. On each settlement a dépôt will be established where settlers can obtain a practical training in agriculture whilst improving the land which will be theirs.

Tasmania.—Under the Returned Soldiers' Settlement Act, 1916,² land is provided for men of the Australian forces and the forces of the United Kingdom, but free grants are only made to men previously resident in Tasmania. Land may be acquired either by purchase or lease. First-class land may be bought up to 200 acres at £1 per acre; a larger area of second-class land at 10s. per acre, and a still larger area of third-class land at 5s. per acre. Payment may be distributed over a period of fourteen years. Advances up to £300 will be made for buildings, improvements, etc., repayable by instalments. No rates or taxes will be payable for the first four years. Some previous experience will be necessary. Experience can be acquired either at the State Farm at Deloraine, which has

¹ 7 Geo. V. No. 1264.

² 5 Geo. V. No. 20.

accommodation for a limited number, or in some cases by working with a farmer.

New Zealand.—The Discharged Soldiers' Settlement Act¹ of 1915 and an amending Act² of 1916 only make provision at present for officers and men belonging to the New Zealand forces, or residents in the Dominion who have served during the war in some other portion of H.M.'s naval and military forces. Areas of land are set apart for selection and facilities are given to acquire holdings on easy terms. Advances may be made to selectors for improvements. Preference is also given to ex-service men at the ordinary land sales and ballots.

Union of South Africa.—Vacant Crown lands to a large extent are situated in remote and waterless regions, which would require considerable opening up for settlement. The Union Government anticipate that making provision for members of the South African Contingent will considerably tax their resources. The presence of native labour makes immigration by persons without command of capital for agricultural purposes almost impracticable; but it is understood that the Government may shortly frame a settlement scheme for a limited number of ex-service men with special qualifications.

The British South Africa Company.—This Company offer 500,000 acres of land free to approved settlers, half in Northern and half in Southern Rhodesia. A capital of not less than £1,000 will be required, and the size of holdings will depend on the fertility of the soil and will average between 1,500 and 2,000 acres, but will in no case exceed 3,000 acres, the holdings being as near as possible of equal value. The land in most cases is suitable for mixed farming and for live stock.

The Company lay down certain conditions of settlement to approved ex-service men, who must be British subjects of European descent from overseas, and who were not at the outbreak of war domiciled in South Africa.

The settlers to be selected in London and on arrival in Rhodesia will be placed under the personal supervision and guidance of the Controller of War Settlement; the settler will be required to deposit £100 to provide for a course of training to extend over not less than

¹ 6 Geo. V. No. 45.

² 7 Geo. V. No. 12.

a year, the deposit to cover his board and lodging, and to include a course of lectures at the Government Experimental Farm.

Opportunities for selection of land will be given him during training, and on permission from the Administrator to take up land he will be granted a provisional title and be required to proceed with the stocking and development of his farm. On carrying out certain acts of husbandry or such improvements as shall in the opinion of the Administrator constitute beneficial occupation of the land, he will be granted a full title free of survey fees and other expenses and subject only to the usual small quit-rent and to the laws of the country governing ownership of land.

Special fares by sea and land will be granted to accepted settlers and also at a later date to their families and dependants. Dependants and families cannot be received during the settler's period of tuition and should not proceed to Rhodesia until the settler has taken up his own farm.

The Administrator at all times will have absolute discretion to approve or reject a settler during his period of training, and in the case of rejection such settler will be provided with a passage to his home overseas.

The Cape Sundays River Settlements, Ltd.—This Company offer to sell to approved settlers small blocks of irrigated land from 20 to 40 acres, for the growing of citrus fruits, lucerne, and other crops. The blocks will be cleared and ploughed ready for planting. If the settler can give security to the Company's bankers in London that he is able to pay one-fifth of the purchase price with interest in the sixth year, the balance can be paid in four further annual instalments. It is recommended that a settler should also possess at least £10 per acre for working capital. The Company provides a qualified staff of advisers to give the necessary information and instruction to settlers.

The property is situated some twenty-five miles from Port Elizabeth in the Cape Province, and is served by three main lines of railway from Port Elizabeth to Cape Town, Johannesburg, and Alexandria respectively, and the district offers special climatic and social attractions.

This property was described in Sir Rider Haggard's report to the Royal Colonial Institute, and the Company have set aside 2,000

acres for settlement to be known as the Royal Colonial Institute block.

The North Charterland Exploration Company (1910), Ltd.—This Company has offered ten farms of 1,000 acres apiece in their Concession of 10,000 square miles in North-Eastern Rhodesia, at the low price of 1s. 3*d.* an acre, subject to a moderate quit-rent, suitable for growing tobacco and cotton. The capital required would not be less than £700.

MALAY MORTGAGE BY CONDITIONAL SALE.

[Contributed by J. E. HOGG, Esq.]

IN a previous number of this Journal¹ it was pointed out by Mr. J. R. Innes, a Judicial Commissioner in the Federated Malay States, that "the Muhammadan rules of testamentary disposition and of inheritance remain practically as they were (in these States) before the advent of British influence," and that English law, as such, does not prevail in the local Courts except in so far as it has been adopted.

With respect to Muhammadan law, it would seem, according to Indian authorities, that in the absence of any legislation to the contrary Muhammadan law on other subjects than testamentary disposition and inheritance—such, for instance, as mortgages—should be applied in a Muhammadan community.²

Generally speaking, it would seem that, these States being Muhammadan, and English law only prevailing so far as introduced by statute or judicial decision, the Courts must in the absence of legislation or local custom fall back on Muhammadan law—so far at all events as Moslems are concerned. Muhammadan law would thus occupy, in the Malay States, the position which the common law and rules of equity occupy in England; *inter alia*, this would seem to be so with respect to the law of mortgage.

Recognition of Muhammadan Law.—One kind of mortgage recognised by Muhammadan law is the mortgage by conditional sale. This (as it exists in India) is effected "by means of two contemporaneous instruments, one of which purports to effect an absolute and unconditional sale, while the other contains a stipulation that the apparent vendor shall have the right to repurchase

¹ "Some Notes on the Constitution and Legislation of the Federated Malay States," *Journal of Comparative Legislation*, vol. xvi. p. 24.

² See *Zohorroddeen v. Baharoolah* (1864), Sutherland, W.R. (Calcutta High Court) 185; *Gopeekrist v. Gungapersand* (1854), 6 Moo. I.A. 53, 79.

the property.”¹ The mortgagee in such a case was in a more favourable position than under an ordinary mortgage: “a deed of conditional sale may execute itself, and the title of the mortgagee may become absolute by virtue of the terms of the contract immediately on default,” with the result that “a mortgagor’s writ to recover possession” is not treated as a proceeding for redemption but as an action against a trespasser, and the period allowed under the Indian Limitation Act is twelve years only instead of the sixty years allowed to a mortgagor.² Thus “. . . a mortgage by conditional sale was enforceable according to the letter, or (to use the language of English lawyers) time was of the essence of the contract.”³

The above statements do not now apply generally in India, since under various statutes the favoured position of the mortgagee by conditional sale is abrogated, and the mortgagor has under every kind of mortgage an equal right to redeem within (under the Limitation Act) sixty years.⁴

In the Federated Malay States no such enactment as s. 60 of the Indian Transfer of Property Act 1882 has been introduced, so that the statements made above as to the mortgage by conditional sale under Muhammadan law would seem to apply in these States, though not now in India. The Indian Limitation Act, on the other hand, has been introduced into the States, and the local statutes are almost transcripts of the Indian Act.⁵

Subject then to any legislative or judicial rule to the contrary, a mortgage by conditional sale would seem to be valid in the Federated Malay States, and to have the incidents above described. Thus a creditor might take from his debtor an absolute assurance of the latter’s land as on a sale, and execute a separate document agreeing to reassure the land to the debtor, upon payment of a sum named or sufficiently indicated, on or before a named date.

The Registration of Titles Enactment 1911.—The only rule of law in the States that could be called in aid against such a transaction would seem to be contained in the Registration of Titles Enact-

¹ Ghose, *Law of Mortgage in India* (4th ed. 1914), 85.

² Mitra, *Law of Limitation in India* (5th ed. 1911), 1193.

³ *Balkisheen Das v. Legge* (1899), L.R. 27, I.A. 58.

⁴ Mitra, *Law of Limitation, supra*; see Indian Transfer of Property Act, 1882 (No. 4), ss. 58, 60.

⁵ See the Selangor Limitation Enactment 1896 (No. 5), sch. 2, arts 112, 115.

ment 1911. By s. 5 of this statute land granted by a State "shall not be capable of being transferred . . . mortgaged . . . or otherwise dealt with, except in accordance with the provisions of" the statute, "and every attempt to transfer . . . mortgage," etc., "except as aforesaid shall be null and void and of no effect." By s. 43, land can only be "charged or made security" by means of a registered charge in prescribed form—a form quite unlike an ordinary "mortgage," by conditional sale or otherwise. These enactments, singularly enough, have proved to be no bar to the creation of a security in the form of a Muhammadan mortgage by conditional sale, in which the creditor obtained the substantial advantage of defeating the debtor's claim to redeem within the statutory period of sixty years. This appears to be the result of a recent Privy Council decision,¹ though the likeness of the security then in question to a Muhammadan mortgage by conditional sale was not referred to. This case is not only interesting by reason of the "undesigned coincidence" in the form and effect of the security, but is of importance as an authoritative interpretation of the provisions of the Registration of Titles Enactment above quoted.

Haji Abdul Rahman v. Mohamed Hassan.—The facts of this case were, shortly, that in 1895 the respondent transferred certain land to the appellant by way of security, and the appellant executed an agreement binding himself to retransfer to the respondent if in six months' time the amount of the debt with interest and costs were repaid him by the respondent; no part of the debt or interest was ever paid by the respondent, and the appellant (who had taken possession of the land upon the execution of the transfer and agreement) remained in possession as owner for eighteen years. The respondent then took proceedings in the local Courts to recover possession and redeem the mortgage. The claim was successful in the two lower Courts, but failed on the appellant's appealing to the Privy Council.

The land being registered land, and the registration statute being adapted from one of the Australian Torrens statutes, the transfer was in the statutory form used where the Torrens system prevails and was duly registered; the consideration was a sum equal to the amount of the indebtedness of the respondent. The

¹ *Haji Abdul Rahman v. Mohamed Hassan*, [1917] A.C. 209.

transfer thus conformed to the requirements—above stated—of the Muhammadan mortgage of conditional sale, in that it purported “to effect an absolute and unconditional sale.” The agreement of defeasance was not registered, nor was it protected on the register by any caveat; inasmuch as it gave the respondent the right to have the land reconveyed to him on payment of the debt, etc., this agreement also conformed to the requirements of a Muhammadan mortgage by conditional sale, for it contained “a stipulation that the apparent vendor shall have the right to repurchase the property.” The likeness to the mortgage by conditional sale was thus complete. Under such a mortgage the respondent would, as already stated, have had twelve years only within which to redeem and not sixty years; his claim for redemption did in fact ultimately fail, because it was held that the statutory period of sixty years was not applicable. The result therefore was precisely the same as it would have been had the security been a mortgage by conditional sale. It remains to explain how this “undesigned coincidence” came about.

It was held by the Courts below, and assumed (without deciding) by the Judicial Committee in the judgment read by Lord Dunedin, that the unregistered agreement was part of a “conveyance in security” and not merely evidence of a *pactum de retro-vendendo*. The enactments above quoted—ss. 5 and 43 of the Registration of Titles Enactment, 1911,¹—require transactions of mortgage, or “charge,” to be evidenced by an instrument in prescribed form and registered, and the agreement was not in statutory form, nor could it be registered. It was therefore held that this agreement “conferred no real right in the land, which remained after the transfer duly registered as the unburdened property of the defendant” (appellant). The agreement, however, though “valueless as a transfer or burdening instrument, . . . is good as a contract.” Although therefore the transfer did effect a “conveyance in security,” this could not be treated as a mortgage, which could only be effected by means of a statutory registered charge. The word “mortgage” in the limitation statute, it was held, did not mean any informal security, but must be restricted, where the registration statute was concerned, to mortgages authorised by that

¹ The federal statute of 1911 is cited for convenience, having now replaced the Selangor statute under which *Haji Abdul Rahman v. Mohamed Hassan* was actually decided.

statute. Consequently, the respondent was not entitled to the benefit of the sixty years' period given by the limitation statute to a "mortgagor."

Notwithstanding that the resemblance between the transaction in *Haji Abdul Rahman v. Mohamed Hassan* and a Muhammadan mortgage by conditional sale is accidental, yet this resemblance is not merely superficial but extends to the essential principles of both. In each case it is the construction of the agreement of defeasance that is the vital matter. In the one case the agreement confers no real right, but is valid as a contract only; in the other it is enforceable according to the letter, and time is of the essence. In each case a merely contractual right is conferred by the agreement, and not an interest in the land. In each case, though the transaction is in some sense a mortgage as being by way of securing payment of money, the parties have not the usual rights and liabilities of mortgagor and mortgagee. In fine, in each case the contract between the parties is taken to mean what it says, without any extension or alteration through the medium of equitable doctrines applicable to a mortgage in the usual English form—"an instrument which perhaps rather lends itself to imposition."¹

¹ Lord Macnaghten, in *Samuel v. Jarrah Timber Corp.* [1904], A.C. at p. 326.

ROMAN-DUTCH LAW IN BRITISH GUIANA AND A WEST INDIAN COURT OF APPEAL.

[Contributed by J. C. LEDLIE, ESQ.]

ON January 1, 1917, the Civil Law of British Guiana Ordinance, 1916 (which was passed on September 2, 1916), came into operation in British Guiana. The event marks an important and decisive stage in the checkered history of the Roman-Dutch Law in the Colony.¹

It is well known that, when the Dutch settlements of Demerara, Essequibo, and Berbice (which were afterwards constituted the Colony of British Guiana) passed definitely under British rule in 1814, the existing local laws and usages were, in accordance with the British policy usual in such cases, left undisturbed. The law thus retained, which is known in the Colony as "the common law," was a form of the Roman-Dutch law:² that mixed system of Germanic and Roman law which grew up in the Low Countries in the seventeenth and the first half of the eighteenth century (*i.e.* during the period of the greatest commercial prosperity of the Dutch), and was carefully worked out, and scientifically developed, in the writings of Grotius, van Leeuwen, Voet, and other very eminent Dutch jurists.³ "It was," says the Report of the Statute Law Committee, upon whose report the enactment was based, "a highly organized and flexible system of common law which, but for the

¹ The way had been prepared for the enactment of this Ordinance by the publication in 1916 of the Report of the Statute Law Committee appointed by the Governor of British Guiana in November 1914, to advise as to the best means of giving effect to the recommendations made by the so-called Common Law Commission in their Report printed in April 1914.

² For fuller details of the history of Roman-Dutch law in British Guiana reference should be made to Professor R. W. Lee's article in vol. xiv. (p. 11) of this Journal; and also to Dr. Bisschop's article on "Modern Roman-Dutch Law" in the *Law Quarterly Review*, vol. xxiv. p. 157.

³ See R. W. Lee, *Introduction to Roman-Dutch Law*, Clarendon Press, p. 14 ff.

special conditions of the Colony, would have proved as suitable for all commercial and social requirements as a similar form of jurisprudence has done for . . . South Africa." Some of these "special conditions" are fully explained in the Report; others are implied rather than stated. Together they form an interesting and instructive bit of legal history.

The Commission of 1824.—Soon after the settlements had passed under British rule, there was serious trouble with regard to the administration of justice in the Colony, and more particularly with regard to criminal procedure. In 1824 a Commission was accordingly appointed "to inquire into the administration of criminal and civil justice in the West Indian and South American Colonies." The recommendations of the Commission were mainly concerned with criminal procedure, a department of law in which the divergence of principle between the Roman-Dutch law and English law would naturally be most pronounced.¹ As regards the civil law, however, *i.e.* the Roman-Dutch substantive law, the Commission cited the opinion of the highest local authorities to the effect that it was "simple and well adapted to the wants and usages of the people," the President of the Courts of Criminal and Civil Justice of Demerara and Essequibo expressly declaring that he "admired the principles of the civil law." The Roman-Dutch common law, the "highly organized and flexible" legal system, accordingly continued in force, and proved, for the time being, quite adequate to the demands made upon it.

Gradually, however, the conditions of the Colony underwent a material change. The English population increased; the resident Dutch dwindled away. "We have no resident Dutch population," says the Report of the Common Law Commission of 1914,² "and few even of the Dutch names survive." The population, moreover, though small (some 312,000), became very mixed in race. Besides a native Indian population, there was a considerable influx of Indians from British India. "East Indians and Portuguese make up some 50 per cent." And at the same time trade, especially with the West Indies and Great Britain, expanded. Thus new

¹ For fuller information as to the early history of criminal procedure in the Colony reference should be made to the above-mentioned article by Professor Lee (pp. 12, 13). The Report of the Commission was only signed by one Commissioner (Mr. Jabez Henry), the other two having died in office.

² See *supra*, p. 62.

economic conditions came into being, and it became necessary to adapt the local law to their requirements. How could this be most satisfactorily accomplished?

Two methods seemed available. The first was to stand by the Roman-Dutch law as the common law; to adhere, as far as possible, to its principles (its "simple" principles); to endeavour to develop it gradually from within, and, by patient piecework, to fit those principles to the novel conditions as they arose. It might doubtless be found convenient from time to time to supplement from outside, *i.e.* from English sources, but the system to be evolved by this method would be, in the main, an independent, a home-grown legal system.

What were the prospects of success for such a method? Were the "special conditions" of the Colony favourable to its satisfactory operation? On the facts as stated in the Report of the Common Law Commission, the answer to this question must, we think, be in the negative.

The Interpretation of the Law.—The fruitful working of the method in question requires that the law shall be handled with sympathy and with understanding; those charged with the administration of the law must be in full accord with its characteristic spirit. Such was the case with our own common law. Such, again, was the case—in a different way—with the Roman-Dutch common law in South Africa.¹ In British Guiana the position was different. There the administration of the law was in the hands of English-trained lawyers. The atmosphere of the Courts was predominantly English. The language was English; the pleadings, the evidence, the arguments were in English. And for English-trained lawyers the Roman-Dutch system, with all its virtues, could not fail to be somewhat of an alien system. It had no prestige of national tradition to back it. "The colonists," says the Report of 1914 (p. 20), "have no sentimental affection for any legal legacy of the Batavian Republic of 1803 or the Kingdom of the Netherlands of 1814." It was, moreover, contained in books—some of them between 200 and 300 years old—which were written in a

¹ Accordingly when the British Guiana Government in 1912 consulted the South African Government as to whether it was proposed to make any change in the South African common law, the reply was "emphatic" to the effect that the Roman-Dutch law was "eminently suitable," and that "the necessity for the substitution of English law had never been seriously entertained."

foreign tongue (Latin or Dutch), and were often difficult of access, whether in the original or in translation.¹ That in such circumstances there should be some lack of sympathy between the spirit of the law to be administered and the administering authorities is hardly matter for surprise. True, there was no want of appreciation of the great merits of the Roman-Dutch law—its lucidity, its simplicity, its “scrupulous reverence for local usage.”² If there were, as one of the witnesses before the Commission stated, judges who tried “to approximate it to English law as much as possible,” there were others who were “particularly wedded to the Roman-Dutch law and always stick out for it.” But however genuine the admiration for the great qualities of the “common law,” and however sincere the endeavour to apply it in a manner conformable to its true spirit, it was almost impossible for English lawyers not to import into their administration and interpretation of the law much of that particular bias of thought and of those habits of reasoning which a schooling in a widely different system had instilled into their minds. To take only one illustration. The principle of *stare decisis* has, as Dr. Bisschop (in the before-mentioned article) has reminded us,³ no place in the Roman-Dutch system; that is to say, decided cases are never (as with us) *sources* of legal rules, and, as such, “authoritative” and binding, but are merely examples, or illustrations, of the *application* of legal rules.⁴ This is an important divergence of principle, and though it would doubtless be easy to exaggerate the practical effects of the divergence, still it represents a difference of mental attitude which would render it difficult for a lawyer trained in one school readily to accommodate himself to methods of reasoning accepted in the other.

If, then, the “special conditions” of the Colony were adverse

¹ As long ago as 1828 the lack of “good translations of the Dutch authorities” was animadverted on, and the Report of 1914 (p. 28) puts in a plea for securing for the Colony “a set of the leading legal and historico-legal authorities.” In British Guiana, moreover, there are no text-books, no written records of judgments of earlier date than 1856, and no reports (Professor Lee, *op. cit.* p. 22).

² Report of 1914, p. 10. “Personally,” said one barrister-witness before the Common Law Commission, “I think that the Roman-Dutch law as regards equity is very equitable indeed.”

³ See also the Report of 1914, p. 5.

⁴ “Non exemplis sed legibus iudicandum est.” The fact mentioned may account partly for the lack of Law Reports in British Guiana, to which reference has already been made. Where decisions have no binding force for the judges, there is not the same incentive for reporting them as there is under our system.

to the healthy growth of the Roman-Dutch law; if they tended to check its natural development and to prevent it from putting forth its full strength; was there any other method of adapting the law of the Colony to changing circumstances more in harmony with its special needs? This was the problem that confronted the colonial authorities, and the method that commended itself to them as an alternative was to substitute English statute and common law for the Roman-Dutch law. If the latter could not be mended, it might perhaps be ended.

The actual course of events was briefly as follows. Until about 1890 the two methods of development operated concurrently, not indeed as settled policies, but as streams of tendency. In the 'nineties, however, the second method definitely gained the upper hand, and the policy of "ending" the Roman-Dutch law became the "accepted policy" of all parties.

The Displacement of Roman-Dutch Law.—Thus, while the general effect of the legislation between 1830 and 1890—the Report of 1914 enumerates some ten Ordinances that altered the law and practice of the Colony between those dates—was to assimilate British Guiana law more closely to English law, the ruling principles of the Roman-Dutch law were not seriously affected, except in the important case of the Ordinance No. 6 of 1864, which introduced English mercantile law wholesale, and constituted the first conspicuous example of the second method of development.¹ After 1890 the "accepted policy" gathered momentum. In 1891 the English Interpretation Act was introduced. Ordinances of 1891 and 1900 largely displaced the common law as to bills of exchange, insolvency, and partnership in favour of the English law on those subjects. In 1904 the old Roman-Dutch (not Roman) principle of community of goods between married persons was swept away. In 1906 the Wills Ordin-

¹ "From and after the commencement of this Ordinance, all questions arising within this Colony relating to the following matters, namely—ships, and the property therein and the owners thereof, and the behaviour of the master and mariners, and their respective rights, duties, and liabilities as regards the carriage of passengers and goods by ships; stoppage *in transitu*; freight; demurrage; insurance; salvage; average; collision between ships; bills of lading; and all rights, liabilities, claims, contracts, and matters arising in respect of any ship, or any such question as aforesaid, shall be adjudged, determined, construed, and enforced according to the law of England applicable to such or the like case." English Company Law was introduced from time to time shortly after the enactment of the English legislation on the subject.

ance introduced the English law as to the execution and attestation of wills. In 1909 the heir was deprived of the character of "universal successor" which the old Roman law had assigned to him, and in the same year the English common and statute law of fire and life insurance was introduced *en bloc*. In 1914 the Sale of Goods Act, 1893, came into force in the Colony.¹

The result of all this comprehensive legislation was to leave the Roman-Dutch law, in the words of the Report, a mere "husk," a "skeleton," a "shattered remnant." But though a remnant, it still retained vitality enough to cause much trouble and perplexity in the administration of the law. For it continued in force except where displaced by Ordinance, and since the various Ordinances above mentioned were passed, not on any definite system, but rather piecemeal, as the exigencies of the time seemed to call for them, and without reference to the provisions of the Roman-Dutch law which they superseded, the relation between the new (English) law thus imported and the existing (Roman-Dutch) law was often a matter of great difficulty to determine, and the resulting confusion and uncertainty was considerable. "We have," says the Commission's Report (p. 20), referring to the co-existence of two heterogeneous elements in the legal system, "all the disadvantages of a mixed system without the elasticity of the Roman-Dutch jurisprudence."²

The Commission of 1912-14.—It was in these circumstances that the Acting Governor of British Guiana on June 4, 1912, appointed the before-mentioned Commission under the Chairmanship of the Hon. J. J. Nunan (then Solicitor-General, afterwards Attorney-General of the Colony), "to inquire and report whether any changes in the common law of the Colony are advisable, and whether such changes, if any, should be made by the substitution of English law [for Roman-Dutch law] or otherwise." The Commission held

¹ The effect was to sweep away (as far as the sale of movables was concerned) a whole group of principles of the Roman-Dutch law. As the Report (p. 19) points out, the Roman-Dutch law recognised no vendor's lien (since property did not, without more, pass from the unpaid vendor till payment). There was no stoppage *in transitu*; no doctrine of "caveat emptor"; the vendor is not bound to pass ownership, but only to guarantee undisturbed possession; the risk passes to the purchaser independently of delivery or payment, even where property has not passed. All these rules were swept aside.

² We are told of cases where counsel on one side relied on the Roman-Dutch law, counsel on the other side on the English law governing contracts. And such cases must have been of frequent occurrence.

seven public sittings in May and June 1913, for the hearing of evidence. The witnesses were nearly all practising lawyers or legal officials. The line of examination was much the same with all. They were invited to give their opinion on a number of legal matters as to which doubts and difficulties had arisen in the local administration of the law. They were also asked their views as to the salving of what remained of the common law. There was no serious divergence of view among the witnesses. "The expression of opinion," says the Report (p. 21), "in favour of the English common law has been practically unanimous, the qualifications of two or three witnesses being confined . . . to the support of the Roman-Dutch law in the abstract, or to expressions of doubt as to the possibilities of effecting immediate radical change in a satisfactory manner." The Report, which is a document of considerable legal and historical interest, gives an account of the Roman-Dutch law in general and traces its history in the Dutch settlements prior to the British occupation. It then proceeds to describe what is called "the legal epochs" of the Colony subsequent to the occupation. After giving a summary account of the proceedings before the Commission appointed in 1824, it enumerates the principal alterations made in the law of the Colony from 1828 onwards, with special reference to the modifications of the local common law thereby effected, and explains very clearly—with regard, for example, to the doctrines of consideration and *stare decisis*—the uncertainty and confusion in the administration of the law which resulted from the dual system of law and from the methods of legislative amendment hitherto followed. In the result the Commissioners came to the conclusion that no half measures would suffice for placing the law of the Colony on a satisfactory footing. They accordingly made a drastic recommendation in favour of the introduction of English common law "in regard to all mercantile matters, to all domestic relations (including marriage, judicial separation and divorce, the law of husband and wife, parent and child, guardian or curator and minors, and master and servant), to the law of delicts or torts, agency, suretyship, liens, intestate succession, and in fact to all the law of persons, things, obligations, inheritance, and every other description of matters whatsoever not dealt with by legislation, or otherwise expressly exempted." An important "exemption" was made with regard to land. "The English law of real property," the Report continues, "should be

expressly excluded." On this point there was absolute unanimity. "We have no desire to introduce the complicated incidents of (English) real property law." Special recommendations were made with regard to a number of heterogeneous legal topics, such as the law of trustees, bills of sale, prescription, intestate succession ("movable and immovable property should be treated alike for all purposes of succession"), legitims, divorce, legitimation *per subsequens matrimonium*, the "Aquilian right" to damages for death caused by negligence, administration, and probate. A special memorandum was devoted to the peculiar local system of conveyancing—the sale, leasing, and mortgaging of land—a system (based partly on the Roman-Dutch common law, partly on Rules of Court) which had been in operation since 1529, and which, with some changes of method, it was desired to retain.¹ Annexed to the Report was a Draft Code called "the Common Law Codification and Reform Bill" for carrying into effect "the more urgent of the measures" suggested by the Commissioners, and the adoption of this Code was recommended.

The Introduction of English Law.—The next step was to put these recommendations into practical shape. To that end the Governor, on November 28, 1914, appointed a Committee ("The Statute Law Committee"), of which Mr. Nunan was again Chairman, "to consider what English statutes should be adopted in the Colony to enable the law to be altered from Roman-Dutch to English." The function of the Committee, as explained in their own Report, was "to assist in the completion of the scheme (suggested by the Common Law Commission) by the recommendation of such portions of the English statute law as will place the community, as far as possible, in regard to legal rules and principles in general, and especially in regard to the rules and principles of commercial law, on the same footing as the people of England at the present time." The Report of the Committee was dated July 27, 1915, and was published in 1916. After adverting to the "accepted policy" of introducing the common law of England and abolishing the Roman-Dutch law "except as to certain subjects which are to be dealt with by Ordinance," they referred to the difficulty of their task "in view of the hitherto uncharted character of the territory" (of the local common

¹ The system is explained in Professor Lee's *Roman-Dutch Law*, pp. 128 ff. and 184 ff

law), and proceeded to examine the position of sundry British Colonies in which, at some time, foreign law had been in force, and the method adopted by them for the purpose of introducing English law in its place—without, however, finding any very helpful precedent. After deprecating “the introduction in bulk of a large number of English statutes among a population unacquainted, as a whole, with the older English legislation,” and unanimously endorsing the view of the Common Law Commission as to the inadvisability of introducing the English law relating to immovable property (including mortgages and servitudes thereof), they proceeded to state the practical conclusions at which they have arrived. With a view to creating, if possible, “a starting point” for dealing with the situation, they urged the passing of an Ordinance in terms of a draft annexed to their Report. This Ordinance, which was described as a “fundamental law” and was, in fact, a revised and considerably enlarged version of the Bill annexed to the Commission’s Report, was entitled “An Ordinance to codify certain portions of the Roman-Dutch Law of the Colony, and in other matters to substitute the English Common Law and Principles of Equity along with certain English Statutory Provisions for the Roman-Dutch Law.” The short title was “The Civil Law of British Guiana Ordinance, 1916.” It was a remarkably comprehensive and variegated piece of legislation. Its effect can be best described in the words of the Committee’s Report, at page 7 :

[It] (a) abolishes the Roman-Dutch law ;¹ (b) introduces the English common law except as to real property ; (c) places movable and immovable property under the English law of personal property, except as to seven specified points ; (d) adopts a form of the Prescription Act, 1832, and the Real Property Limitation Act, 1874, and vests the foreshore in the Crown ; (e) codifies the law of intestate succession along the lines of the Statute of Distribution, 1670 . . . and Intestates’ Estates Act, 1890, modified in favour of the equality of males and females and the rights of illegitimates as recommended by the Common Law Commission ; (f) deals with wills, charities and gifts in accordance with the Wills Act, 1837, and other English statutes, adapting the Thellusson Act, 1800, and the Accumulations Act, 1892, and including by reference the preamble to 43 Eliz. c. 4 as regards charities ; (g) preserves the Roman-Dutch legitimation *per subsequens matrimonium*, and abolishes the *annus luctus*, *læsio enormis*, and the Roman-Dutch “exceptions” of excussion and division, and

¹ This requires some qualification, as we shall see presently

similar pleas; (h) incorporates the Trustee Acts, 1893 and 1894, the Habeas Corpus Act, 1679, the section of the English Judicature Act, 1873, making choses in action assignable, the Slander of Women Act, 1891, and 3 & 4 Will. IV. c. 41, s. 52, giving a right of action against executors for injuries to property by the deceased for six months prior to the death, and (i) adopts the principles of the Lunacy Act, 1890, by giving the Supreme Court control over the persons and property of lunatics.

It adapted some seventeen English Acts in whole or in part, and included by reference four others. "Its consequences," says the Report (p. 9), "are meant to be very far-reaching."

This "fundamental law" formed the groundwork of the reform recommended by the Common Law Commission. In addition the Committee submitted ten supplementary bills dealing with various subjects to which the Commission had called attention, viz. 1. infants; 2. divorce; 3. carriers; 4. pledges of movables (bills of sale); 5. documents of titles to goods (Factors Act); 6. arbitration; 7. deeds of arrangement; 8. accidental deaths and workmen's injuries; 9. registration of title; and 10. deceased persons' estates. "The whole scheme," says the Report, "is therefore complete in eleven bills."

It should be added that s. 3, sub-s. 1 of the fundamental Ordinance abolished the Roman-Dutch common law, as such, in very sweeping terms,¹ but that sub-s. 4 (a) expressly preserved the (Roman-Dutch) principle of absolute private ownership in land, and 4 (b) similarly preserved the Roman-Dutch law as to mortgages of land and real servitudes.

Such was the singular legislative experiment recommended by the Commissioners. In view of the intrinsic merits of the Roman-Dutch common law—which were frankly acknowledged—it might, perhaps, appear to some, at a distance, that the slower and more cautious method of development from within, or, it may be, the

¹ "The law of the Colony relating to wills, *fidei commissa*, trusts, suretyship . . . hiring and lease, landlord and tenant, negotiable instruments, bailments, carriers . . . every description whatever of contract and obligations . . . all questions relating to husband and wife, marriage, separation, divorce . . . and the law of the Colony relating to all other matters whatsoever, whether *eiusdem generis* with the foregoing or not, shall cease to be Roman-Dutch law, and as regards all matters arising and all rights acquired or accruing after the date hereof, the Roman-Dutch law shall cease to apply to the Colony."

patient elaboration of a comprehensive Civil Code—the neighbouring island of St. Lucia suggests a precedent—would offer greater prospects of a successful solution of the problem. That the proposals were unprecedented was freely admitted by the Common Law Commissioners themselves, who indeed showed some signs of trepidation on that score. Their appeal to the maxim, “*Communis error facit ius*,” was not very encouraging, and it may be open to some doubt whether the Commissioners in the performance of their difficult task acted altogether in the spirit of the passage from Renan cited by them, “The real men of progress are those whose starting-point is a profound respect for the past.”

However this may be, the practical administrators on the spot—who must, after all, have the last word in such a matter—appear to have been virtually unanimous in favour of the proposals. The changes, revolutionary as they were, excited neither discussion nor controversy. On the contrary, the publication of the Committee’s Report in January 1916 was promptly followed (in September of the same year) by the passing of the Civil Law of British Guiana Ordinance, 1916, which is practically identical with the fundamental Ordinance annexed to the Report. As already stated, it came into operation on January 1, 1917.¹ The die is thus cast and the experiment launched. The results are a matter of speculation. If the experiment fails, it will, at any rate, not be for want of trouble taken. If it succeeds, the administration of law in the Colony will be freed of many perplexities that now beset it.

The West Indian Court of Appeal.

In the Report of the British Guiana Common Law Commission reference is made (p. 21) to a proposal to establish a West Indian Appeal Court. The proposal has been under discussion for some time past, and has been received with widespread sympathy and interest. It has been commended on the very legitimate ground that it would not only tend to improve the administration of law in the Colonies concerned, but would help to “link up the scattered fragments” of the West Indian portion of the Empire, and con-

¹ At the time of writing no information has come to hand as to whether the complementary recommendations of the Committee have been carried into effect. Probably they have.

solidate and strengthen West Indian interests in the Imperial counsels. After being in abeyance for many years, the suggestion was revived in 1912, and has since been the subject of many interchanges of opinion between the authorities of the Colonies in question.

An important step forward was taken in January 1916, when ten delegates from the Colonies of Barbados, British Guiana, the Leeward Islands, Trinidad and Tobago, and the Windward Islands, appointed by their respective Governments, met at Port-of-Spain, Trinidad, to discuss the clauses of a proposed Imperial Act, which had been drafted by the Attorney-General of Trinidad, for the purpose of establishing the Court of Appeal "and for purposes ancillary to its establishment." The Conference held four sittings under the Presidency of the Chief Justice of Trinidad, and arrived at substantial agreement on all points of importance but one. The main conclusions come to may be summarised as follows: A Court to be called the "West Indian Court of Appeal" should be set up by Imperial Act for the before-mentioned Colonies, with power to the King in Council to add any other Colony, in or near the West Indies, that desired to be included in the scheme, or to direct that any Colony already included in the scheme should, if it so desired, be excluded therefrom.¹

The Court was to be in substitution for, not in addition to, any existing local Court of Appeal. The law to be administered was to be that of the Colony from which the appeal came. The Court was to be ambulatory, with headquarters at Port-of-Spain. The right of appeal to the King in Council was not to be affected.² As to the constitution of the Court, it was agreed that it should consist of the Chief Justices of Trinidad and Tobago, British Guiana, Barbados and the Leeward Islands, and the senior substantive Chief Justice of the Windward Islands, and that the first-named Chief Justice should be *ex officio* President. But a proposal that the Act should

¹ In a speech made by Mr. Nunan on February 5, 1917 (published in the June 1917 issue of *Timchri*, the excellent journal of the Royal Agricultural and Commercial Society of British Guiana), it is stated that the Bahamas are now willing to come into the scheme, and that "questions of steamer communication alone postpone Jamaica's accession." It seems probable that British Honduras will follow suit.

² Appeals from the Colonies in question to the King in Council are not numerous. In the five years commencing in 1910 there were only five—three from Trinidad and Tobago, and two from British Guiana.

also make provision for the appointment of a "barrister judge" from the United Kingdom revealed great differences of opinion among the delegates, those from Barbados, the Leeward Islands, and Grenada being strongly opposed to the suggestion, on the ground that it was unnecessary and, in any event, too expensive, while the delegates from British Guiana and Trinidad (who urged that the Colonies they represented would probably contribute seven-eighths of the total number of appeals to the Appeal Court) expressed a decided opinion in its favour. It is understood that this question has proved a serious stumbling-block, and has not yet been adjusted. We may, however, venture to express a hope that the obstacle will not prove insuperable.

The total annual cost of the Appeal Court is estimated at about £1,500, exclusive of the salary of any judge brought in from outside.

The connexion between the proposal to create a West Indian Court of Appeal, on the one hand, and the before-mentioned legislative reforms in British Guiana, on the other, is this: In appeals from British Guiana the Appeal Court would have to administer British Guiana law. Now, the common law of British Guiana was Roman-Dutch law. The only member of the Court of Appeal, however, who could be relied on to know Roman-Dutch law would be the Chief Justice of British Guiana (who could not sit in appeals from his own decisions), and (possibly) the "barrister judge" (if any) imported from outside. The result would be that, in the words of Mr. Nunan, the judges of the Appeal Court would have "to plunge into the study of a [to them] new system of jurisprudence for the benefit of litigants in British Guiana." And since (to quote the Report of the Common Law Commission, p. 21) "the serious study of the [Roman-Dutch] common law is a matter of years of patient labour. . . . the prospect of decisions on [that] law by West Indian judges based upon casual study for the purpose of trying isolated cases is not attractive." The conclusion drawn from this state of things was that such parts of the Roman-Dutch law as it was desired to preserve for the Colony should be embodied in an Ordinance, and the remainder abolished. This, as already explained, has now been done. Some doubt may, however, be expressed whether, even so, an Ordinance resting in fact on a basis of Roman-Dutch law can be satisfactorily handled and interpreted by a Court that makes no claim to have knowledge of that law.

MARRIAGES BETWEEN ENGLISH WOMEN AND NATIVES OF BRITISH INDIA.

[Contributed by SIR E. J. TREVELYAN.]

DURING recent years Indians have come to England in increasing numbers, and have in many cases married English wives. Formerly such marriages were few in number, and there was no necessity for calling public attention to them, but now that they are by no means infrequent it might be profitable to consider their validity and effect.

This Journal is not concerned with the propriety of such marriages. In the majority of cases such alliances must lead to unhappiness. The views of the East and of the West differ considerably as to the meaning of the marriage relationship, and as to the position of women in Society. Differences of religion, of habits of life, and of education prevent the complete union which is necessary for happiness in the married state. Both parties to the union are disappointed, even when there has been no deceit.

Validity.—First as to validity of the marriage. There is no doubt that if there be no existing valid marriage, a marriage in England according to English forms is valid according to English law, even where the personal law of the husband permits a plurality of wives.¹ Where there is a previously married wife in existence the marriage is void.² A marriage in a foreign country would apparently be regarded in England as upon the same footing as a marriage between an Englishman and an Englishwoman in that country.

The second question, which has been recently determined by the Courts, is as to the legal effect of marriages contracted in England

¹ See *Chetti v. Chetti*, [1909] P.D. 67; *Re Mir Anwaruddin*, 33 *Times* Law Reports, 59; on appeal *ibid.* p. 78.

² *Grenal v. Grenal*, *Times*, August 1, 1907.

under English forms between Indians and English women. There has for some time been considerable doubt as to the binding nature of a marriage so contracted. As pointed out in *Mir Anwaruddin's* case, "marriage according to English law and as understood in all Christian countries has been defined by Lord Penzance in *Hyde v. Hyde*¹ as 'a voluntary union for life of one man and one woman to the exclusion of all others.' 'Marriage in Christian countries,' 'Christian marriage,' 'Marriage in Christendom,' or some equivalent in phrases used for convenience to express this idea. The idea to be expressed, as Lord Hannen said in *Brinckley v. Attorney-General*,² is 'that the only marriage recognised in Christian countries is the marriage of the exclusive kind . . . mentioned.' " This view of the status of married persons applies even if the personal law of one of the contracting parties permits polygamy. The status is based upon the contract, but is created by the law and not only by the contract. *Mir Anwaruddin's* case further decides that such marriage can only be dissolved by a competent Court. *Mir Anwaruddin* attempted to put into operation the personal power of divorce which is allowed to him by the Mahomedan law, but the Courts could not recognise such action as having any binding effect.

Dissolution.—As the law now stands there are considerable difficulties in the way of the dissolution of such marriages, when the husband has not adopted an English domicil. When the husband has abandoned his Indian domicil and has adopted an English domicil no difficulty presents itself. The English Court has then complete jurisdiction. But where, as is generally the case, the Indian domicil is retained by the husband, and consequently has been adopted by the wife by her marriage, the English Matrimonial Court has no jurisdiction.³ Is there any Court in India which has jurisdiction to dissolve such a marriage? If the wife remains a Christian, and is resident in India, and the matrimonial offence has been committed in India she can apparently obtain relief under the Indian Divorce Act (IV. of 1869); but the non-Christian husband has no remedy under that Act. Hindu law does not contemplate a divorce of any kind, but custom permits it among some low castes. The Courts in India have no power to grant a divorce to Hindus. The Mahomedan law only contem-

¹ L.R. 1 P.D. at p. 133.

² See *Le Mesurier v. Le Mesurier*, [1895] A.C. 517

³ 15 P.D. at p. 80

plates the dissolution of a marriage by a Court in certain specified cases, which do not include the cases of what English law contemplates as matrimonial offences, but it gives almost absolute power to the husband to effect a divorce without the intervention of the Court. In the case of Parsis the Parsi Matrimonial Courts acting under the Parsi Marriage and Divorce Act, 1865 (XV. of 1865), have jurisdiction only when both husband and wife are Parsis. So in the cases which we are considering the husband has no remedy in Courts of law, and is tied for life to an offending wife unless he abandons his Indian domicile.

The Attitude of the Indian Courts.—The next question is what attitude would be adopted by the Courts of Law in India with regard to mixed marriages of the kind which we are considering. Those Courts have to administer Hindu law in questions of marriage between Hindus, and Mahomedan law in questions of marriage between Mahomedans. In *Chetti v. Chetti* it was contended that as the Hindu law does not permit any marriage between a Hindu and a non-Hindu the marriage was void, but is this a question of a marriage between Hindus? It is a question of the marriage of a Hindu and a non-Hindu. In applying the rules of equity and good conscience which they are bound to apply in the absence of express provision the Indian Courts would undoubtedly accept the view of the English Courts as to the status of the husband and wife, at any rate in the case where the marriage has been contracted in England.

What is the position of the Indian Courts in dealing with mixed marriages contracted in India? If they are contracted in accordance with the Indian Christian Marriage Act, 1872 (XII. of 1872), it may be assumed that the Courts would adopt the views taken by the English Courts and hold that a marriage under that Act had the same force as a marriage contracted in England under English forms. A marriage under Hindu forms is impossible, and cannot arise. It is quite competent for a Mahomedan husband in India to marry a Christian wife according to Mahomedan forms. Such marriage would be valid according to Mahomedan law. There is no reason why it should not be recognised by the Courts. In every respect it would be in the same position as a marriage between Mahomedans. The divorce allowed by Mahomedan law and only that form of divorce would be applicable to it.

There is another difficulty arising out of these mixed marriages. A Hindu or Mahomedan contracts a marriage in England according to English forms. Although his personal law permits polygamy, will he not be liable to be convicted of bigamy if he takes another wife during the life-time of his English wife? It was suggested by one of the learned Judges in *Mir Anwaruddin's* case that he would be liable to prosecution, and it seems difficult to contend that such conviction is not the logical result of the view which the Courts have taken.

The cases of Englishmen who marry Indian wives are very few, and require little consideration. Their marriages are usually made according to the provision of the Indian Christian Marriage Act. Cases have occurred where Englishmen have adopted the Mahomedan faith, and have married Mahomedan women according to Mahomedan forms. In those cases their marriages would be governed by Mahomedan law.

The above statement of the law shows, it is submitted, that legislation either in England or in India, or in both is urgently necessary. It is necessary to protect English women, and to a lesser degree Indians who enter into these alliances. What form should such legislation take? It would be well to declare expressly the validity and effect of such marriages. In order to provide means for the dissolution of such marriages in proper cases, it might be desirable to extend the jurisdiction of the English Matrimonial Court to all cases in which marriages are contracted in England according to English forms. The scope of the Indian Divorce Act might also be extended so as to include all cases where either party to the marriage professes the Christian religion.

MINISTERIAL RESPONSIBILITY IN THE DOMINIONS.

[*Contributed by* PROFESSOR A. BERRIEDALE KEITH, D.C.L.]

THE retirement of Sir Gerald Strickland after a career of marked distinction as Governor of Tasmania and Western Australia, from the office of Governor of New South Wales, which he has held since 1912, as the outcome of friction with his Ministers, is an event of much more than personal interest. It marks, in fact, the culmination of a change of opinion in the Commonwealth with regard to the position of the Governor the extent of which is apparently scarcely recognised in Australia itself. The episode is in no way isolated, though it has not hitherto resulted in the retirement of a Governor, and it is significant that the Governors who have evoked the strongest expressions of disapproval from important sections of public opinion have been men of exceptional ability.

The Position of the Governor and the King.—The possibility of such friction is due to the constitutional distinction between the position of the Governor and the King with regard to the acceptance of ministerial advice. It is now clearly the established rule in the United Kingdom that the responsibility for the political government of the country rests with the Ministry, and that any advice which after full consideration they decide to offer on political matters will be accepted by the Crown, a doctrine which may be deemed to have been definitely and finally affirmed by the action of the King in accepting ministerial advice on the question of the concurrence of the House of Lords in the passing of the Parliament Act.¹ The recognition of this principle secures the Crown from attack on grounds of political partisanship, and removes any barrier to the existence of the most complete confidence between the Ministry and the Crown, thus enabling the

¹ *Responsible Government in the Dominions*, iii. 1627, 1628; see also correspondence in *The Times*, September 24 and 28, 1917.

King to afford to successive ministries the benefit of an experience which increases in value with the length of the monarch's reign.

The Powers of the Governor.—As the result, however, of the process of development of self-government in the Dominions, the happy conditions which prevail in the United Kingdom have not yet been established. Prior to responsible government, the Governor in a colony exercised the whole of the executive power, subject indeed to the often minute but largely ineffective control of the Secretary of State for the Colonies, but independent of the wishes of the legislature in all matters for which legislation was not essential. The grant of responsible government deprived him of much of his power, but it could not place him in the position of the Crown in the United Kingdom, even had the position of the Crown there been as clearly understood in the middle of the nineteenth century as it now is. The Governor remained the representative of Imperial control, and it was only by a gradual process that the doctrine was evolved that Imperial control should be confined to those matters only which vitally affect the Empire as a whole, such as foreign policy and shipping. This process, however, has still formally left untouched one function of the Governor which assumed great importance at the outset of responsible government. With ministries new to responsibility, with an imperfectly formed and not completely effective public opinion, it was felt that some security for the observance of the true principles of responsible government was necessary, and this was found in the Governor, who was held even in matters of purely internal interest to be under the obligation of securing the observance of constitutional government. This principle expressed itself in the doctrine that a Governor was justified in rejecting the advice of Ministers in any matter if he had solid grounds for believing that their views would not be endorsed by the legislature and the constituencies, a doctrine formally enunciated as late as September 26, 1892, by Lord Ripon in a despatch to the Governor of New Zealand.¹ The existence of the independent authority of the Governor naturally tended to throw Ministers into antagonism to him, and has resulted in the regrettable but very common practice in Australia of leaving the Governor ignorant of the intentions of his Ministry. On the other hand, the view that the Governor was

¹ *Parliamentary Paper*, H.C. 198, 1893-4, p. 37.

the guardian of constitutional practice encouraged ministries in flagrant disregard of their duty in the matter: advice was freely given without due responsibility, as is admirably illustrated by the incident of Lord Carrington's refusal as Governor of New South Wales in 1886 to grant a dissolution to Sir John Robertson. "Now, Sir John," Lord Carrington is reported to have said,¹ "man to man, if I were in your place and you were in mine, and I asked you for this dissolution, would you grant it to me?" Sir John at once replied, "I'd see you d—d first." The same admission has been made, if in less piquant language, by more than one Prime Minister since Sir John Robertson.

The Personal Discretion of the Governor.—There is thus thrown upon the Governor, in any crisis in which political feeling runs high and political opinion is in any way equally divided, the burden of exercising a personal discretion as to accepting the advice of his Government with the certainty that his decision will be resented by the party which he fails to help. In 1908 Sir T. Gibson (now Lord) Carmichael, as Governor of Victoria, granted a dissolution to Sir T. Bent and was bitterly attacked in the press and in Parliament, because he had failed to foresee that by an unexpected turn of political opinion Sir T. Bent would be badly defeated at the general election.² In 1907 Lord Chelmsford in Queensland declined to promise his Premier the use of the prerogative to overcome the resistance of the Upper House to the proposals of Mr. Kidston's government,³ and despite the protests of the majority in the Lower House, dissolved it on the advice of Mr. Philip, who formed a Ministry on the resignation of Mr. Kidston as a protest against the refusal of the Governor to accept his advice. The constituencies defeated Mr. Philip decisively, the Lower House passed an address regretting the Governor's action, and further proceedings were averted only by a change of political groupings which caused Mr. Kidston to form a coalition with Mr. Philip's party. In both these cases it is perfectly clear that the Governor was acting strictly in accordance with the constitutional position assigned to him, but both illustrate the unfairness of placing upon a Governor the burden of forecasting the probable result of an appeal to the constituencies.

¹ Sir G. Reid, *My Reminiscences*, p. 57.

² *Responsible Government in the Dominions*, i. 193-9.

³ *Ibid.* ii. 582-5.

Moreover, the inevitable tendency of assigning a personal responsibility to a Governor is to induce him to overstep the bounds set to this responsibility by constitutional usage, as was seen very clearly in Tasmania in 1914 when Sir W. Ellison-Macartney, after refusing to grant a dissolution of Parliament to one Ministry, appointed another on certain conditions, including an undertaking by the Premier that he would advise a dissolution, a step condemned by the House of Assembly and disapproved by the Secretary of State for the Colonies.¹

In Sir G. Strickland's case two grounds of disagreement between the Governor and the Ministry are apparent.² In the first place, owing to an alteration in the grouping of political parties as the outcome of the question of conscription which had illogically enough been imported into State politics, though military matters appertain only to the Commonwealth Government and Parliament, Mr. Holman's Government were for a time unable to command a majority in the Lower House on a question of confidence: this position the Governor interpreted as an indication that the Ministry no longer commanded the support of the legislature and the constituencies, and so informed the Premier, with the result, in itself satisfactory, that the negotiations for a coalition between Mr. Holman and the supporters of Mr. Wade were carried out promptly, and an effective Government constituted, doubtless to the great advantage of the conduct of public business. In the second place, it was decided by the Government to secure the passing of an Act for the extension of the life of Parliament, and it was understood that the Governor doubted his ability to assent to such a measure, both on legal grounds and on the principle that such a measure should not be passed in the face of the strong protest of the Labour party in Parliament and in the State, which argued, probably correctly, that a dissolution of Parliament at that moment would return it to power, while delay would tell in favour of its opponents. It can hardly be doubted that on the constitutional rules hitherto observed in Australia the Governor was fully entitled to act as he did.

The Transfer of Responsibility.—It is impossible therefore to resist the conclusion that the development of the Dominions has

¹ *Parliamentary Paper*, Cd. 7506.

² See *Sydney Morning Herald*, November 11 and 21, 1916, and *Daily Telegraph* of the same dates.

reached the point when the practice of the United Kingdom should be introduced, and in all matters of internal affairs the Governor should act on the advice tendered to him by the Ministry in office, being definitely relieved from all personal responsibility. This view has the support of so able a politician as the late Sir Charles Tupper, who bitterly resented to his death the refusal of Lord Aberdeen, contrary to the British practice, to sanction the proposals for appointments made by his Government when defeated at the general election in 1896.¹ In practice it was observed by Earl Grey when in 1911, on the defeat of Sir Wilfrid Laurier at the polls, he made no effort to hasten the resignation of the Government or to refuse its advice. Lord Islington also, during the confused political situation in New Zealand in 1912, when the Ministry had no real support, declined to use the royal prerogative to secure a defined issue, though his inaction was attacked in a section of the press. Still more striking is the refusal of the Governor-General of the Commonwealth in 1914 to accept the appeals made to him by the Labour party to refuse the Liberal party a double dissolution of the Commonwealth Parliament: every precedent pointed to refusal, ordinary dissolutions having on three previous occasions been refused in the Commonwealth on far less substantial grounds, and Sir Ronald Munro-Ferguson's action is explicable and justifiable only on the ground of the practice in the United Kingdom.²

The advantages of the change are plain: The present position is misinterpreted in the Dominions by the public generally as Imperial interference in local concerns, and is confused with the action of the Governor when he represents some definite Imperial interest: thus in New South Wales there were not wanting suggestions that the Imperial Government were directly interested in Mr. Holman as a supporter of the policy of Mr. Hughes, the Prime Minister of the Commonwealth, and the exponent of an imperialistic policy. In the second place, the way would be paved for more frank co-operation between Ministers and the Governor, which is impossible so long as Ministers are afraid of revealing their weaknesses to one who may feel called upon to reject their advice simply because they are weak. In the third place, encouragement would

¹ *Life and Letters of Sir Charles Tupper*, ii. 214, 215, 220, 221.

² *Imperial Unity and the Dominions*, pp. 106-12.

be given to the development of the feeling of political responsibility among ministries when they realised that their advice would be acted upon on their sole responsibility. Finally the step is essential if the ideal of the Imperial War Conference is to be attained, and if the self-governing Dominions are to acquire the position of equality in political status with the United Kingdom which their statesmen have declared that they desire,¹ and which the United Kingdom is ready and willing to concede.

¹ *Parliamentary Paper*, Cd. 8566, pp. 40-61. See also the letter from the Hon. C. G. Wade, Agent-General of New South Wales, in *The Times*, September 20, 1917, in which he supports the change of practice here advocated.

MILITARY SALVAGE.

[Contributed by COMMANDER MAXWELL ANDERSON, R.N.]

MILITARY or prize salvage is the compensation or reward given to those who deliver a property out of the hands of a hostile captor. The restitution upon payment of salvage of British property retaken from an enemy is stated by Sir Leoline Jenkins¹ to have been the constant practice in the Admiralty of England.² In its wider extent and as regards the restitution of recaptured neutral property, the principle of military salvage depends on the rule of international law that the title in captured property is not changed by the mere act of capture—possession only is lost—and the final divestment of ownership can only be effected by sentence of condemnation pronounced by a duly constituted Prize Court, and by *bona fide* sale, after condemnation, to a citizen of a neutral State. This sale becomes necessary since if the ownership of the property remains in a citizen of the enemy State and the property be recaptured, the sentence of condemnation will be void as against the original British owner, who will be entitled to the return of his property upon payment to the recaptors of the requisite salvage.³

While the captured property remains in the possession of the enemy, the rights of the original owner are merely in suspension, and such rights become capable of resumption, on payment of salvage, if and when recapture takes place.

In most States the right of restitution upon salvage and the quantum of the award for the services rendered is settled by municipal enactment. In England, as between subjects, the rights of the original owners are for ever preserved (*jus postliminii*) subject only to the one exception that where the captured vessel has, by the

¹ Judge of the Admiralty, *temp.* Charles II.

² Cited at 1 Dods. 109 note.

³ The *Cornelia*, Edwards, 244.

captors, been set forth for war, the vessel if recaptured will not be restored, but is to be dealt with as an ordinary prize.¹

The quantum of the award is fixed at one-eighth of the value of the recaptured property, with the proviso that in cases of special difficulty or danger the Court may, if it deem fit, award a higher sum, not exceeding, however, one-quarter of such value.²

These rates in terms apply only to recaptures by the King's ships, but claims for military salvage are not confined to such vessels. Recaptures are not effected under any authority of commission, for "it is the duty of every subject of the King to assist his fellow subjects in war and to retake their property in possession of the enemy; no commission is necessary to give a person so employed a title to the reward which the policy of the law allots to that meritorious act of duty."³

The old Prize Acts,⁴ therefore, while assessing the reward to a King's ship at one-eighth, gave to the private ship a sum dependent upon the length of time the enemy had been in possession of the captured property; under twenty-four hours' possession, one-eighth was given; between twenty-four hours and forty-eight hours, one-fifth; between forty-eight and ninety-six hours, one-third; and over ninety-six hours, one-half. The King's ship and the private ship alike were usually given one-half the value of the recaptured property in cases where the vessel had been set forth for war.⁵

After 1793,⁶ while the reward to the King's ship was retained at one-eighth, that of the private ship was fixed at one-sixth, and cases arose in which it was necessary to determine under which heading the recaptor vessel fell.⁷ In these Acts also there appeared for the first time the proviso that where the recaptured vessel had been set forth for war she was to be treated as a prize.

Privateering being abolished by the Treaty of Paris, the Prize Act of 1864, now in force, provides only for the reward to be paid to the King's ships, and it is to be presumed that should a British ship now-a-days be recaptured by an armed merchant vessel, a proceeding

¹ Naval Prize Act, 27 & 28 Vict. c. 25, s. 40; and as to what constitutes a setting forth for war: the *Ceylon*, 1 Dods. 105.

² *Ibid.*

³ The *Robert*, 3 C. Rob. 224.

⁴ 13 Geo. II. c. 4; 17 Geo. II. c. 34; 29 Geo. II. c. 34.

⁵ The *Reward*, Marriott, 226.

⁶ 33 Geo. III. c. 66; 55 Geo. III. c. 130.

⁷ The *Sedulous*, 1 Dods. 253.

by no means inconceivable, the quantum of the salvage reward would be in the discretion of the Court.

It is to be noted that the Prize Act makes no mention of freight, but if the recaptured property is taken to its place of destination, the freight is earned, and being included in the value becomes liable for its share of the reward.¹

The essence of military salvage or of recapture being the application of force or terror, it has been held that where the enemy has abandoned his prize (*animo derelinquendi*) there is a total extinction of his rights, and if the derelict be brought into port by a British ship, there having been no application of force, the service is a common civil salvage, and not military.² The application of force, however, does not require that a fight shall take place, nor even that the recaptor shall put a crew on board the recaptured vessel; it is sufficient if by his presence the enemy be so circumstanced that all ability to resist or prospect of escape is lost and dominion over the prize is thereby extinguished.³

It has been stated that the Prize Court of the enemy which pronounces sentence of condemnation must be duly constituted, and in order that its decrees may be recognised it is also requisite that the proceedings of the Court be in accordance with accepted principles of international law. These requirements are shown in the case of the Bergen prizes, in which a French consul purported to hold a Prize Court in Norwegian (neutral) territory, and passed sentence of condemnation upon vessels captured by French naval forces. One of the vessels so condemned being recaptured, Lord Stowell held that the neutral purchaser's title could not be sustained as against the original owner, to whom the vessel was restored upon payment of the usual salvage.⁴

Military salvage is not awardable for services rendered to a consort,⁵ nor for the recapture of a vessel which the enemy has released on bail,⁶ since in this latter case no service has been rendered to the owner. If, however, the enemy reverse the decision of his own Prize Court, the rights of the original owner and of the recaptors revive and salvage will be due.⁷

¹ *The Race Horse*, 3 C. Rob. 101.

² *The Lord Nelson*, Edwards, 79.

³ *The Edward and Mary*, 3 C. Rob. 305.

⁴ *The Flad Oyen*, 1 C. Rob. 135.

⁵ *The Belle*, Edwards, 66.

⁶ *The Robert Hale*, Edwards, 265.

⁷ *The Charlotte Caroline*, 1 Dods, 192.

If after recapture from the enemy a vessel is again captured, and subsequently a second time retaken from the enemy, the first recaptors have no claim for salvage. Their rights are lost, divested by the rescue, and the second or last recaptors are alone entitled to the reward,¹ they being deemed the efficient recaptors.

Civil salvage may be superadded to military salvage, and such cases occur where the recaptured vessel is in a disabled or sinking condition, and arduous service such as refitting and repairing is necessitated before the vessel can be taken to a friendly port. As was stated by Lord Stowell in the *Louisa*:²

Though it is certainly the duty of the King's ships to afford assistance to all His Majesty's subjects whom they may meet in distress, yet I do not know that it is incumbent on them at the hazard perhaps of their lives to take charge of a vessel in a sinking state. Any hesitation in affording assistance might be of dangerous consequence to the property of persons so circumstanced, and it is therefore proper for the encouragement of prompt and signal exertion on the part of the King's officers and men to hold out to them the prospect of reward. . . . The captain of a man-o'-war is not bound to put himself or his men in danger to preserve a merchant vessel from sinking, and I do not know that he is bound to take her in tow.

If the property recaptured belongs to citizens of an allied State, the practice is to apply, for better or worse, the principle of reciprocity. If the ally condemns, this country condemns, and if the ally restores, this country restores. Where the ally makes restitution on payment of salvage, such rate of reward as is in force in the allied State will be applied to recaptures made by British citizens, and this whether the allied rate exceeds or is less than the British rate.³

With neutrals, however, it is usual to make restitution without condition imposed, since in theory neutral property should not be endangered by capture. It is to be presumed that the captor's own Prize Court will release the property as soon as its neutral ownership is established, and consequently the recaptors have rendered no service to the owners. When, however, experience shows that the captor's Prize Courts or the decrees of his Government are in opposition to the established principles of the law of nations, and in consequence there exists a real danger that the neutral will be deprived

¹ The *Polly*, 4 C. Rob. 217 note (a).

³ The *Santa Cruz*, 1 C. Rob. 50.

² 1 Dods. 317.

of his property, it is then to be considered that the recapture has rendered him a real benefit and salvage will be decreed to the recaptors.¹ Such a condition of affairs has arisen in Germany during the present war, and in the case of the *Pontoporos*,² a Greek vessel recaptured from the Germans by H.M.S. *Yarmouth*, salvage was decreed. In the course of his judgment in that case the President (Sir S. Evans) stated the principles upon which salvage will be decreed for the recapture of neutral property, remarking *inter alia* :

If by some remote fortuity her case had ever come to be adjudicated before a Court, enough has come to the knowledge of this Court to satisfy the Court that the chance of her owners of obtaining restitution would be as nothing. The "presumption which is to be entertained in favour of every State which has not sullied its character by gross violations of the law of nations" can no longer be expected to avail the State of the original captors.

The *Pontoporos* is the only case of military salvage which has come before the Courts during the present war. This is due chiefly to the German practice of sinking at sight, and often without warning, all vessels, enemy or neutral. The chivalry of the sea has been destroyed, and with it has gone the opportunity of recapture. In the old wars many a prize had to fight her way home to the ports of the captors, and many a vessel was recaptured *en route*. It was all a game, albeit a serious one, of chance and skill, good luck and good seamanship, and the fighting was clean. But to-day murderers lurk unseen beneath the waves, and in pure wanton lust of destruction deal out death to ships and crews, and slink off before assistance can arrive. No enemy prize can be found, and in consequence there exists no opportunity for recapture.

¹ *The War Onskan*, 2 C. Rob. 299.

² 2 British and Colonial Prize Cases 87.

THE DECLARATION OF A PROTECTORATE IN EGYPT AND ITS LEGAL EFFECTS.

[Contributed by SIR MALCOLM MCILWRAITH, K.C.M.G., K.C.]

ON December 18, 1914, there was issued in Cairo, and published both on the walls of the city and in a special edition of the Egyptian *Official Journal*, a Proclamation by the British Secretary of State for Foreign Affairs in the following terms :

His Britannic Majesty's Secretary of State for Foreign Affairs gives notice that, in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of His Majesty and will henceforth constitute a British Protectorate. The suzerainty of Turkey over Egypt is thus terminated, and His Majesty's Government will adopt all measures necessary for the defence of Egypt, and protect its inhabitants and interests.

On the following day there appeared a further Proclamation, deposing the Khedive in the following terms :

His Britannic Majesty's Secretary of State for Foreign Affairs gives notice that, in view of the action of His Highness Abbas Hilmi Pasha, lately Khedive of Egypt, who has adhered to the King's enemies, His Majesty's Government have seen fit to depose him from the Khedivate, and that high dignity has been offered, with the title of Sultan of Egypt, to His Highness Prince Hussein Kamel Pasha, eldest living Prince of the family of Mohammed Ali, and has been accepted by him.

In the same number of the *Official Journal* there was published an official covering despatch, signed by the Acting British Representative in Egypt, which accompanied the transmission of the above Proclamation to the Sultan (hereinafter referred to as "the despatch"), of which the following are the most important passages :

... From the facts above set out, it results that the rights over Egypt, whether of the Sultan or of the late Khedive, are forfeit to His Majesty.

. . . It remains to lay down the form of the future Government of the country, freed, as I have stated, from all rights of suzerainty or other rights heretofore claimed by the Ottoman Government. Of the rights thus accruing to His Majesty, no less than of those exercised in Egypt during the last thirty years of reform, His Majesty's Government regard themselves as trustees for the inhabitants of Egypt. And His Majesty's Government have decided that Great Britain can best fulfil the responsibilities she has incurred toward Egypt by the formal declaration of a British Protectorate, and by the government of the country, under such Protectorate, by a Prince of the Khedivial Family. . . . Great Britain accepts the fullest responsibility for the defence of the territories under Your Highness against all aggression, whencesoever coming ; and His Majesty's Government authorise me to declare that, after the establishment of the British Protectorate now announced, all Egyptian subjects,¹ wherever they may be, will be entitled to receive the protection of His Majesty's Government. With the Ottoman suzerainty, there will disappear the restrictions heretofore placed by the Ottoman Firmans upon the numbers and organisation of Your Highness's Army, and upon the grant by Your Highness of honorific distinctions. As regards foreign relations, His Majesty's Government deem it most consistent with the new responsibilities assumed by Great Britain that the relations between Your Highness's Government and the Representatives of Foreign Powers should, henceforth, be conducted through His Majesty's Representative in Cairo. His Majesty's Government have repeatedly placed on record that the system of treaties known as the Capitulations by which Your Highness's Government is bound are no longer in harmony with the development of the country ; but in the opinion of His Majesty's Government, the revision of those treaties may most conveniently be postponed until the end of the present war.

In the field of internal administration I am to remind Your Highness that in consonance with the traditions of British policy, it has been the aim of His Majesty's Government, while working through and in the closest association with the constituted Egyptian authorities, to secure individual liberty, to promote the spread of education, to further the development of the natural resources of the country, and, in such measure as the degree of enlightenment of public opinion may permit, to associate the governed in the task of government. Not only is it the intention of His Majesty's Government to remain faithful to such policy, but they are convinced that the clearer definition of Great Britain's position in the country will accelerate progress towards self-government.

The religious convictions of Egyptian subjects will be scrupulously respected, as are those of His Majesty's own subjects, whatever their

¹ A new law of Egyptian nationality will now be necessary. It doubtless forms part of the legislation in course of preparation.

creed. Nor need I affirm to Your Highness that, in declaring Egypt free from any duty of obedience to those who have usurped political power at Constantinople, His Majesty's Government are animated by no hostility towards the Kaliphate. The past history of Egypt shows, indeed, that the loyalty of Egyptian Mohammedans towards the Kaliphate is independent of any political bonds between Egypt and Constantinople. The strengthening and progress of Mohammedan institutions in Egypt is naturally a matter in which His Majesty's Government take a deep interest, and with which Your Highness will be specially concerned, and in carrying out such reforms as may be considered necessary, Your Highness may count upon the sympathetic support of His Majesty's Government.

Such were the brief announcements ¹ which, by a stroke of the pen, put an end to the complicated international status of Egypt, built up—as between the Porte and Europe—by a long succession of treaties in the course of the last five centuries, and—as between the Porte and Egypt—by a series of diplomatic conventions and Imperial Firmans from 1840 onwards.

The Control of Foreign Relations.—Perhaps what will chiefly strike the legal reader, on a perusal of the above documents, is the meagreness of the information they afford as to the main lines of the new political fabric thus created, and the absence of any indication in the terms of the despatch as to the precise limits of the respective spheres and mutual relations of the Protecting and Protected Governments. It will be noticed that, though a large variety of important questions, relating to both external and internal sovereignty, are mentioned in the despatch—such as British protection for Egyptians, the removal of restrictions on the Army and on the grant of honorific distinctions, the privileges of foreigners, individual liberty, education, agriculture, self-government, religious institutions, etc., etc.—almost the only definite statement of future intentions is that relating to the conduct of foreign relations; and this is, in reality, a truism. Protectorates are of many kinds and degrees and each one is more or less a law unto itself, but the control of the foreign relations of the Protectorate

¹ It may be convenient to mention here, as part of the new status of the country for the time being, that by a Proclamation of November 2, 1914, when Turkey entered the war, the General Officer commanding the troops in Egypt had announced that he "had been directed to assume military control of Egypt, and that the country was placed under martial law from that date."

by the Protecting State is common to them all.¹ I ventured to point this out, many years ago,² apropos of the dispute with the late Boer Republics, observing that the clause in the treaty³ concerning the control of foreign relations was sufficient, on generally accepted principles, to establish the fact of Great Britain's Protectorate over the Transvaal, which was, at that time, contested. The principal bone of contention, however, in connection with Protectorates, has usually been as to the degree of intervention permitted to Protecting States in the internal affairs of their Protectorates. On this point, the weight of authority among leading writers on international law is in the sense that such intervention, on the part of the Protecting State, is justifiable whenever it is necessary in order to safeguard the responsibility of the latter State towards foreign nations; and to that extent only. Starting from this point, it has, indeed, been found possible to draw up a tolerably complete list of the heads under which such intervention naturally falls, as has been done by several writers.⁴

The Special Position of Egypt.—In the present case, it must be admitted that the above documents throw little light on all these matters, and it would indeed be difficult for the international and constitutional lawyer to spell out of them the organic principles of the new régime. It is, therefore, scarcely surprising that they should have been the subject of a good deal of criticism in legal circles in Egypt, more especially among Continental and Egyptian lawyers, who are usually more interested in questions of legal doctrine than their British brethren. But, so far as the substance of the matter is concerned, the fact is that such general agreement as has been arrived at, among international lawyers, as to the nature and limits of Protectorates, has little application to the special case of Egypt, where the Protecting Power has militarily occupied and civilly administered the country for thirty-five years. It is this superimposition of a formal Protectorate

¹ Cf. Westlake, *International Law* (Cambridge, 1910), Part I. p. 22: "In all Protectorates it is arranged that the Protected State shall enter into no treaty, or have any diplomatic intercourse with outside States, without the consent of the Protecting State."

² See *Law Quarterly Review*, April and July 1896.

³ Convention of London, 1884, Article IV., under which Great Britain had a right of veto on any treaty proposed to be concluded by the South African Republic.

⁴ See, notably, Pillet, *Revue de droit international*, 1895, No. 6, p. 598.

on the previous long-established occupation—officially recognised by the Great Powers since 1904—which distinguishes this Protectorate from all others, and furnishes the key to the solution of the various legal problems which may arise. The rights of Great Britain in Egypt are primarily founded not upon general doctrines of international law applicable to any Protectorate which a Great Power may be pleased to declare, but on the specific and fundamental fact that she rescued the country in 1882, by force of arms, from anarchy and bankruptcy, and saved from destruction the dynasty of Mohammed Ali, from one member of whose family she has now transferred the rule to another.

As to the question of form, this was naturally largely determined by the basic considerations set forth above, which lie at the root of the whole matter. Moreover, as the despatch contains about the same amount of information as is to be found in the Firmans, to which the country and the European Powers were accustomed, it was considered to be sufficient for the purpose in view. Finally, it appeared expedient to leave subsequent developments to be, to some extent, determined by the political evolution of the Egyptians themselves, under the new conditions. This is indicated by the allusion in the despatch to the question of self-government, which the regularisation of the situation may be expected to accelerate. In proportion as representative institutions should be extended in Egypt,¹ the rôle of the Protecting State would be correspondingly curtailed. This is entirely in harmony with our national habits and traditions. There is nothing particularly modern about the policy of waiting and seeing. It has at all times characterised British legislative and diplomatic methods, in a greater or less degree, and it unquestionably has its advantages, as well as its defects. In the present case, the former probably outweigh considerably the latter.

Comparison with Tunis.—From the point of view of comparative legislation, however—with which this Society and its Journal are mainly concerned—it might be of interest to compare the course taken in Egypt, and the nature of the declarations made, with

¹ The organic institutions of Egypt have quite recently undergone considerable modification and extension, the new Legislative Assembly—a fusion of the former General Assembly and Legislative Council—having been opened with some pomp by the Khedive in the autumn of 1913. Presumably, however, the Constitution will require further revision in connection with the abolition of the Capitulations referred to later.

the action of other countries in declaring Protectorates, and notably with that of France, and the precision and clearness with which she regulated all these matters, when she established her Protectorate in Tunis in 1882, at the same moment when we went to Egypt.¹ But, on the one hand, the conditions and origin of the Egyptian Protectorate differ so profoundly from those of its Tunisian predecessor that the comparison—though undoubtedly interesting, particularly as regards the careful definition of the powers and attributions of the French Resident—is not really very relevant; and, on the other hand, present conditions with regard to space necessarily exclude everything which is not absolutely essential to the subject. In so far as Tunisian precedents appear to be of a nature possibly to afford assistance in future developments in Egypt,² they will be referred to later.

In order to appreciate properly the nature and extent of the changes effected in the Egyptian political situation by this snapping of the links with Turkey, it is necessary to pass, as briefly as may be, in review the more salient features of the previous régime.

Historical Retrospect.—The historical events which led up to the Convention of London of July 15, 1840—the starting-point of Modern Egypt—and the results of the intervention of the four great Powers (Great Britain, Austria, Prussia, and Russia) in response to the appeal of the Sultan to protect him from his rebellious and too victorious vassal, Mohammed Ali, are too familiar to require recapitulation here. It will suffice to recall that, in pursuance of this Convention, the Sultan addressed to the Viceroy of Egypt two Firmans of February 13, 1841, the first of which fixed the conditions under which the province of Egypt was to be detached from the direct control of Turkey, and

¹ The basis of Franco-Tunisian arrangements was an elaborate treaty of May 12, 1881, between the French Republic and the Bey of Tunis. This was supplemented, in the course of the years 1881 and 1882, by various Presidential Decrees of the President of the French Republic, by a further Convention of June 8, 1883—which is the legal source of most of the powers since exercised by France in Tunis—by an important Decree of November 10, 1884, conferring a legislative veto on the French Resident, and, finally, by a Decree of June 23, 1885, which still further defined the nature and extent of the French Protectorate, and in the main regulates these matters to the present time.

² This organisation, having stood the test of some thirty years' working and being generally considered to have proved successful, has recently been adopted by the French, in substantially the same form, for their new Protectorate in Morocco.

placed under the hereditary administration of Mohammed Ali and his descendants ; and the second which granted to him, for life only, the provinces of Nubia, Darfur, Kordofan, and Sennaar.

The Firmans of 1841.—These Firmans of 1841 form the basis of the modern constitutional régime of Egypt, which, though thus partially detached from Turkey, remained subject to the suzerainty of the Sultan, as a result of the provisions contained in these documents. This new status was developed—being sometimes extended and sometimes curtailed—by a succession of Firmans in the course of the next half-century, from 1841 to 1892—of which the most important were as follows :

1. That of 1866 by which Ismail Pasha obtained, among other concessions, the substitution of the principle of primogeniture in the succession for that of seniority in the family (by which alone succession is regulated in Turkey) ;
2. That of 1873 by which he acquired the right to conclude treaties concerning commerce, customs, and police with foreign Powers ;
3. That of 1879 by which his son, Tewfik Pasha, succeeded, with the assistance of England and France, in retaining certain privileges which had previously been granted to his father (viz. the power to conclude commercial conventions) ; and
4. That of 1892 by which Abbas Hilmi Pasha, with the assistance of Great Britain, successfully vindicated his rights to the Peninsula of Sinai, the possession of which the Sultan, by a disingenuous omission in the Firman, had attempted to resume.

The Dependency of Egypt upon Turkey and the International Character of the Firmans.—It is important to observe that all these Firmans, though in form unilateral grants by the Sultan, were, in reality, international instruments, being concerted among the Powers chiefly interested, and then imposed by them upon a more or less recalcitrant Suzerain. As considerations of space obviously preclude even a summary of Egyptian history in the nineteenth century, no attempt can be made here to explain in detail the successive stages by which all these matters reached their ultimate development. It must suffice to consider the position they had

attained at the time of the accession of the last Khedive, who reigned from 1892 to 1914.

In the first place, it had by then become well settled that though the Khedivate was an hereditary office, transmissible in the direct line of primogeniture, nevertheless a formal Firman of Investiture was required from the Sultan, at the commencement of each new reign; and the office was held subject to the terms of such Firman and conditionally on their due observance. It was, however, made clear to the Porte by the Powers, on several occasions, that such conditions could not derogate essentially from those laid down in previous Firmans, since these constituted international agreements between Turkey and the Powers themselves. As between the Sultan and the Khedive, they were also of a contractual nature, and a failure to observe their terms involved, by the latter, forfeiture, and by the former, diplomatic constraint of a practically irresistible character. It was, in fact, on the ground of non-observance of such conditions that Ismail Pasha was deposed by his Suzerain in 1879, his son, Tewfik, being nominated in his stead.¹

2. In return for the political and administrative rights thus granted by the Porte, a pecuniary tribute was imposed on Egypt which originally varied with the extent of the territory granted. At the accession of the late Khedive, it amounted to the sum of £T750,000, or about £E665,041.

3. In theory, all the taxes were levied in the name of the Sultan. This condition had been prescribed by the Convention of London and every subsequent Firman accordingly provided that "all taxes and revenue, levied in Egypt, shall be raised in my Imperial Name." But it had long become a dead letter in practice, since nothing, in the form of the levy, indicated the circumstance to the taxpayer. Moreover, it had no practical interest, since the Khedivial Government had full power to create, modify, or suppress taxation, without any intervention by the Porte.

4. The coinage of the country was required by the Firmans to be struck in the name of the Sultan, and originally it had to be

¹ The principle had been clearly laid down by the Convention of London in a memorandum of 1841 in the following terms: "If Mohammed Ali or any of his successors should infringe the conditions on which the hereditary Government of Egypt is conferred on him, he may be deprived of his office."

similar to the money in use in Constantinople. This condition was, however, subsequently relaxed by the Firman of 1866, and in the end the sole trace of the requirement was the retention of the Imperial monogram (Toughra) and date of the Imperial reign on Egyptian coins.

5. The Egyptian Army was declared to form part of the Imperial forces and was limited to 18,000 men, though, under Ismail Pasha, it had at one time been allowed to reach 30,000. During the Crimean and Russo-Turkish Wars, an Egyptian contingent was, in fact, despatched to the aid of the Porte. During the Turco-Greek war of 1897, however, Egypt contented herself with breaking off diplomatic relations with Greece.

6. Certain restrictions were imposed by the Firmans on the grant by the Khedive of honorific distinctions. Thus the Orders of Chivalry in Egypt were Turkish Orders—the “Osmania” and the “Medjidia”—and the Khedive was not permitted, in theory, to advance officers of the Army beyond the rank of colonel, or civilians beyond that of bey (sanieh). In practice, advancement to the rank of civil and military pasha was effected by the use of berats and brevets sent from Constantinople in blank.

7. The Firmans further provided that the flags of the Army and Navy and the badges of officers should be the same as those in use in the Turkish Army. It was also laid down that the words of command in the Army should be given in Turkish.

The Internal Sovereignty of the Khedive.—Such were the chief *external* signs of the dependency of Egypt on Turkey. Let us now briefly examine the restrictions placed on the *internal* sovereignty of the Khedive, some of which were of considerable importance. Originally the Turkish Government appears to have held the view that, as a necessary consequence of the supremacy of Turkish authority in Egypt, the whole of the organic laws of Turkey were applicable to Egypt. The Firman of 1841 declared that “the organic laws in force in the different parts of my Empire, or hereinafter to come into force, shall be enforced and applied in Egypt,” though it added “in conformity with justice and equity, and taking into consideration the customs and character of the inhabitants.” Experience, however, soon demonstrated the practical impossibility of any such wholesale legislative assimilation.

Accordingly the Firman to Ismail Pasha of 1867 granted wide powers of legislative autonomy to the Khedive and explained the meaning to be attached to the Firman of 1841 in the following terms :

My Imperial Firman (of June 1, 1841) stipulates that the organic laws in force in the different parts of my Empire, or hereafter to come into force, shall be enforced and applied in Egypt, in conformity with justice and equity, and taking into consideration the customs and character of the inhabitants. But, by organic law is meant the general principles set forth in the Charter of Gulhana (guarantee of life, property, and honour). The internal administration of Egypt, and in consequence the financial, material, and other interests of the country, having been confided to the Government of the Viceroy, it has seemed necessary to accord permission to the Egyptian Government to make all those regulations or institutions which it considers necessary for this purpose, in the form of special acts of internal administration. All the treaties signed by my Imperial Government shall be, as always, executory in Egypt. But the Khedive has full authority to conclude with foreign agents special conventions relating to customs, to questions of police in reference to foreign subjects, to the transport and direction of the post. But these conventions shall not be promulgated in any manner similar to the form of treaties or of political conventions. In the event of these acts not being in conformity with the provisions above-mentioned, and where they prejudicially affect my territorial sovereignty, they shall be considered null and void.

These provisions were renewed in even clearer terms in the Firman of Investiture of Abbas Hilmi Pasha in 1892, which contained the following declaration on this point :

The inhabitants of Egypt are my subjects, and not liable to any kind of oppression or arbitrary treatment ; but, subject to these terms, the Khedive of Egypt, *on whom is conferred the civil, financial, and judicial administration of the country*, is at liberty to make and promulgate, in conformity with justice, all such regulations and internal laws as may be necessary in this respect.

It is, therefore, clear that, subject to the observance of the principles of the two main charters of Turkish public law—the Hatti Cherif of Gulhana of 1839, and the Hatti Humayun of 1856, at the time of the Treaty of Paris—the widest powers of internal legislative autonomy were entrusted to the Khedive.

Restrictions upon the Powers of the Khedive.—The principle,

indeed, was complete legislative freedom for internal affairs. But this freedom was restricted on certain points, of which the following are the most important :

1. No treaties could be made by the Khedive other than those relating to commerce, customs, and police. All such conventions were required to be communicated to the Porte prior to promulgation, though this did not imply any right of interference by the Porte, so long as there was no infringement of any political treaties concluded by Turkey. Under these powers, a large number of commercial treaties have been concluded by Egypt with numerous European Governments, from 1884 onwards. But when, in 1872, the Khedivial Government was negotiating with the Powers of Europe certain modifications of the capitulation rights of foreigners, on condition of the institution of Mixed Tribunals, composed, in majority, of European judges, it was objected, on behalf of some of the European Governments concerned, that the Khedive had no power, under the Firmans, to negotiate concerning the rights of sojourn of foreigners in his country. Inasmuch as the Firman of 1867, above quoted, referred only to "customs and police" in connection with foreigners—a phrase which was clearly inadequate to cover the administration of justice generally—the objection appeared to possess some force, and Nubar Pasha accordingly undertook to obtain the adhesion of the Porte to the new judicial arrangements, which he successfully accomplished. At the same time, he succeeded in obtaining from the Porte the promulgation of the Firman of 1873, which made it clear that Egypt, while unable to conclude any political treaties, had the fullest power to negotiate conventions of all other kinds "for all relations with foreigners, and all internal and other affairs of the country."

2. The early Firmans prohibited the raising of any public loans by the Khedive in his own name, the consent of the Porte being indispensable for this purpose. Ismail Pasha, however, in 1872 obtained, on certain terms, financial freedom in this respect, with results which were disastrous to his country. The public debt of Egypt rose from £3,292,000, at which it stood in the time of Said Pasha in 1862, to some £90,000,000 by the end of 1876, when it became clear that the country was practically bankrupt as a result of the prodigality of the Khedive, and that liquidation arrangements were inevitable.

Accordingly, the Firman of 1879, on the accession of Tewfik Pasha, prohibited all future borrowing by the Khedive, except for the purpose of liquidating the bankrupt situation of the country, and with the consent of the representatives of the bondholders; the same provision was repeated in the Firman of Abbas Hilmi Pasha.

3. The Firmans expressly prohibited any alienation by the Khedive of any part of the territories placed under his administration, or of any of the other privileges granted to him. The Porte, indeed, always affected to consider the Khedive as a mere agent, entrusted with certain powers of administration, but, like other administrators, without any power of alienation. This provision occasioned some difficulty at the time of the Soudan Convention, and, as a matter of fact, that document, though published in the *Egyptian Official Journal*, was never officially communicated to Turkey, or to any foreign government. Its legal validity has often been contested, and the question has, indeed, been more or less directly raised before the Courts; but no decision directly adverse to such validity has ever been given by them.

4. The Khedive was refused the right to maintain diplomatic representatives at foreign Courts, inasmuch as he had no power to conclude political treaties, and his interests abroad were represented by the Suzerain Power. For similar reasons, the Egyptian Government was debarred from taking part in international congresses of a political nature, or from adhering to international conventions of such a character. Egypt has, however, habitually participated in Sanitary Conferences, as well as at an Agricultural Congress at Rome in 1905. She has also adhered to the Postal Convention of Berne of 1874, and of all subsequent conventions of the Postal Union. Such matters are clearly of a non-political character and partake of the nature of police regulations.

Such, briefly summarised, were the principal features of the late political régime.¹ It has, in the past, been at times a subject of lively controversy between international lawyers whether, taken together, they constituted Egypt a "vassal" or a "semi-sovereign"

¹ Among the large number of works which contain information on all the above matters, I may refer particularly to the very useful work of Professor Lamba of Cairo on *Le droit public et administratif de l'Egypte* (Cairo, 1909); and to that of Professor J. H. Scott on *The Law affecting Foreigners in Egypt* (Edinburgh, 1907).

State¹—the latter being slightly more independent than the former—and both points of view have been ardently championed by a number of distinguished authorities. But whatever academic interest the discussion may ever have possessed has now largely disappeared, and no attempt need be made to recur to it here.

The Alteration of the Political Status.—It remains to consider the legal effect on all these matters of the Proclamation of a British Protectorate by the documents above cited; and here it must be admitted that we are at once faced with the initial difficulty, from a legal point of view, that whereas the political status of Egypt is the result of international agreements between certain Powers, and has been treated for generations as the concern of all the Great Powers, it has now been fundamentally altered by the unilateral act of one of them only—doubtless by far the most important one, as the occupying Power, whose preponderance has been officially recognised by the others since 1904—but still, only one of the parties to the London Convention of 1840 and the subsequent diplomatic arrangements which arose out of it. That the status of Egypt was, in fact, of an international and contractual character, resulting from the arrangements made among themselves and with the Porte by the Great Powers, has been constantly recognised, and can scarcely now be seriously contested. If it be asserted that all that has been done is to substitute the suzerainty of Great Britain for that of Turkey, by a kind of political subrogation, the rights of third parties not being prejudiced or affected thereby, it remains none the less true that the relations between Egypt itself and its Suzerain—the Porte—have been not only modified, but completely severed. We ourselves have, however, more than once proclaimed that no modification of such relations could take place without our consent² and therefore,

¹ In the case of *The Charkieh* (L.R. 4 A. & E. 1873) it was held that the Viceroy of Egypt was "a subject Prince" and Egypt "not even a semi-sovereign State," on five grounds, some of which, however, had ceased to be valid in the time of Abbas II.

² See, notably, the despatch of Sir E. Baring to S.E. Tigrane Pasha of April 13, 1892: "Your Excellency is aware that no alteration can be made in the Firmans regulating the relations between the Sublime Porte and Egypt without the consent of Her Britannic Majesty's Government." Cf. also Scott, *op. cit.* p. 141: "Examples of this claim made by the European Powers are given by the diplomatic questions raised in regard to the interpretation of clauses in the Firmans of 1866, 1879, and 1892."

presumably, without that of the other Powers interested. This, at any rate, is undoubtedly the view of the leading foreign international jurists, of whom the great Russian publicist, M. de Martens, may be taken as a type. In his work on the Egyptian question and public international law he wrote :

Les actes du 15 Juillet 1840, ayant été conclus par un accord international, il est évident qu'un nouvel accord entre les grandes Puissances européennes pourrait seul modifier les droits et privilèges qu'ils ont créés. Des Firmans spéciaux ont élargi encore les droits du Viceroy à l'égard de la Porte ; mais il va sans dire que ces Firmans n'ont nullement pu abolir, ni même modifier, d'une manière essentielle, la position créée par la Conférence de 1840.

French legal opinion is, generally, in the same sense.¹

However, the difficulty is doubtless one of form rather than of substance. It may be assumed that the change was made with the full assent and concurrence of our Allies ; and as regards our enemies, it is no less manifest that the status of Egypt is of such general importance to Europe that it must be part and parcel of the final settlement to be effected at the end of the war. It was obviously not possible to negotiate with them *pendente bello* ; and considerations of self-defence and the protection of the country required immediate and drastic action. It is, therefore, difficult to see what other course could, under the circumstances, have been taken. Finally, there are the considerations set forth on p. 242, as to the special rights of Great Britain, which are, perhaps, the most pertinent of all.

The Legal Effects of the Change.—Turning now to the legal effects produced by this political transformation scene, let us take the above-enumerated features of the late political régime in order, and see how they have been affected, dealing first with the external signs of political dependency on Turkey.

1. The Khedivate, dependent on a Firman of Investiture from the Sultan, and subject to the suzerainty of the Porte, has definitely disappeared, and has been replaced by a Sultanate under the Protectorate of Great Britain. To this dignity a Prince of the house of Mohammed Ali has been summoned by the invitation of the Pro-

¹ See, e.g., *La législation égyptienne annotée*, par Octave Borelli Bey, 1892. Introduction, p. ix.

tecting Power. No reference, however, is contained in the above quoted documents to the question of heredity, or of the succession generally; and no public announcement on this delicate matter has yet been made. It is, therefore, for the present, shrouded in obscurity.¹

2. As regards the money tribute to Turkey, it has apparently been pledged or hypothecated by the Turkish Government as security for a loan or loans, and it is believed that such hypothecation has, since the British occupation of Egypt, received some assent or recognition from the British Government. The payment of the tribute, therefore, will doubtless have to be continued by Egypt.

3. The taxes will henceforth be levied solely in the name of His Highness the Sultan. This point, however, as previously observed, had long ceased to have any practical importance.

4. The coinage of the country has already been completely remodelled, and no longer bears any resemblance to the former currency. It carries, on the face of it, an indication of the new official connection of the country with Great Britain, the value being superscribed in English as well as in Arabic.

5. All restrictions on the size of the Army have been removed, as is expressly stated in the despatch. Presumably the words of command will now be given in Arabic, and no longer in Turkish, as was prescribed by the Firmans.

6. The restrictions on the award of honorific distinctions have likewise been removed. Several new Orders have been created,² and the insignia of the old ones are no longer worn, by civilians, during the war. (The Turkish ribbons appear, however, to be still retained on their uniforms by officers.)

7. The Egyptian flag has already been differentiated from that of Turkey. It is probable that it may undergo further transformation, various new designs being, it is understood, under the consideration of the British and Egyptian Governments.

¹ Since the above was written, Sultan Hussein Kamel has passed away, and it has been announced that he is to be succeeded by his youngest brother, Prince Ahmed Fuad Pasha. This solution of the question will give general satisfaction in Egypt.

² These are the orders of Mohammed Ali and of the Star of the Nile for men and the "Kemal" ("Perfection") for women. Recently, a medal "for merit" has been instituted.

Next, as regards internal affairs :

As regards legislation of an internal character generally, it is clear that, with the disappearance of Turkish suzerainty and of the whole régime which bound Egypt to that country, the extent of Egyptian legislative autonomy in administrative, judicial, and financial affairs remains undefined, and must necessarily be, in some manner, regulated in future as between the Protecting Power and the Egyptian Government. When the new legislative machinery, which is presumably in course of preparation, is introduced, will anything in the nature of the Tunisian system of the requirement of an official visa by the Representative of the Protecting Power be introduced ?¹ In many respects it seems a valuable and effective means of control, though it is possibly open to certain objections.

The Tunisian Board of Civil Comptrollers.—As regards internal administration generally, the French, in Tunis, set up a Board of Civil Comptrollers, constituting a branch of the Administration wholly separate and distinct from the Tunisian authorities, composed of eighteen Frenchmen appointed by the President of the Republic, on the proposition of the Minister of Foreign Affairs, representing the Resident in their different districts, corresponding with and reporting to him alone, and supervising generally the whole civil administration of the country.

Would such a Board—having, it is believed, purely consultative powers—be likely to prove suitable to Egyptian conditions in the future administration of Egypt ? Probably not. The English Civil Service in Egypt is now so fully organised, with its large and well-trained staff of inspectors in every department, that it probably constitutes a far more effective instrument for general supervision and control than the somewhat crude French mechanism above described.² While, however, on the subject of Boards, a hope may perhaps, without impropriety, be expressed that something in the nature of a Viceroy's Council, on Indian lines, will be established. The great defect of British civilian organisation in Egypt, as it has

¹ See French Presidential Decree of November 10, 1884, conferring on the Resident of the French Republic " the power of approving, in the name of the French Government, the promulgation and execution in the Regency of Tunis of all Decrees issued by the Bey."

² I am unable to say whether this institution still survives unaltered, in Tunis to the present time.

hitherto subsisted, has been a regrettable want of cohesion and solidarity between the British heads of departments themselves, and even between the five Advisers,¹ and the complete absence of any adequate co-ordinating authority in the form of an official Council, with clearly defined powers and duties, where all legislative and administrative projects of general interest could be communicated, discussed, and, to some extent, decided. The result has been an undue concentration of power in the hands of one individual—the Financial Adviser—because he alone has a seat on the Egyptian Council of Ministers and is thus able effectually to forward or to block any proposal of his colleagues.² It is not suggested that such power has been, at any time, abused, though the defects of the system have been undoubtedly more noticeable under some holders of the office than under others. But, in any case, it is clearly an abnormal one—the product of the long preponderance of financial pre-occupations in Egypt—and, under the new conditions, the time appears to have come when all such anomalies should disappear.

Limitations on Egyptian Autonomy.—Passing now to the specific limitations on Egyptian autonomy imposed by the former régime :

1. Egypt is now emancipated from all disabilities in respect of the conclusion of political treaties, adhesion to political conventions, participation in political congresses, etc., etc. The extent, however, to which she will be enabled to avail herself of this freedom of action will, of course, be a matter of arrangement between her Government and that of the Protecting Power. Notably as regards commercial conventions, if the Tunisian precedent be followed, such matters will now be entirely taken over by the Protecting Power. In Tunis, all commercial conventions are negotiated and concluded solely by the French Government with the foreign government concerned. When all the necessary formalities have been completed, the conventions are promulgated in Tunis by a Decree of the Bey. Presumably the formal transfer of foreign relations to the Protecting Power, alluded to below, implies a similar result in Egypt. It may be anticipated that there will not be in future, in

¹ Representing respectively Finance, Justice, Interior, Education, and Public Works.

² An eminent Egyptian statesman once remarked to Lord Cromer in my presence : “ Il ne faut pas se cacher derrière son petit doigt. Le Conseiller Financier, c'est tout le Gouvernement ! ”

Egypt, diplomatic representatives empowered to conduct negotiations in such matters. It will, therefore, doubtless prove more convenient that they should be conducted in London.

2. The financial fetters placed on Egypt by the Turkish Firmans, which, since 1879, have prevented her from raising loans, have now been removed and she will henceforth be able to make such financial arrangements as she may desire, subject only to whatever restrictions may be, publicly or privately, placed on her freedom of action in this respect by the Protecting Power. Inasmuch, however, as Egyptian financial stability has, since the collapse of Ismail, been the crux of the whole Egyptian question, as European experience of State finance in Egyptian hands has not been encouraging, and as such stability is clearly the condition of all future progress for the country, it is little likely that the close control hitherto exercised by Great Britain over such matters will, under the new arrangements, be in any way relaxed. Any other prospect would, indeed, occasion general uneasiness.

3. The restriction on the alienation of territory or the privileges conferred upon the Sultan will, probably, continue to subsist, expressly or impliedly, in whole or in part. But under the new conditions there no longer appears to be much danger of the kind apprehended by Turkey in former times, and the matter therefore is of little interest.

4. The conduct of foreign relations is one of the few matters of administration expressly dealt with by the despatch, as above observed. It is there stated that they will be conducted "through" His Majesty's Representative in Cairo. This statement is obviously lacking in precision, and it will no doubt be found difficult to say exactly what is meant. In Tunis, the Bey issued a formal Decree appointing the French Resident his Minister of Foreign Affairs. Is it proposed that the British High Commissioner shall receive a similar appointment from the Sultan? So far, nothing of the sort has followed. Advantage was, however, taken of changes in the Ministry to leave the post of Minister of Foreign Affairs vacant, though I am unable to say whether it has yet been formally suppressed in the Budget. But that Ministry itself, with its whole native staff, headed by an Egyptian Under-Secretary of State, still, it is believed, subsists; and recently a British Director-General was appointed, by the nomination of a Foreign Office official who

had previously served in Egypt and was well acquainted with the local conditions and personnel.

The Present Position.—The former Representatives of the Powers—who were known as “Agents and Consuls-General,” and some of whom had the rank and title of Ministers Plenipotentiary—accredited to the former Khedivial Government, either directly or through the Porte, have still remained in Egypt since the war, with the exception, of course, of the Representatives of the enemy Powers, who were invited to leave the country at an early stage of the war, together with the enemy judges of the Mixed Tribunals. Some of the neutral Representatives have not, however, so far officially recognised the new Protectorate, and are, in consequence, presumably in a condition of suspended animation. Even the Allied Representatives must find it somewhat difficult to conduct their business between the British High Commissioner, the General Officer commanding the troops and administering martial law, the Egyptian Under-Secretary of State for Foreign Affairs, and the British Director-General of the same department! All these matters will evidently take some time to adjust. Indeed, it is difficult to see how they *can* be adjusted satisfactorily, or even at all, before the end of the war. But the same observation applies to many other things in Egypt—as elsewhere. Diplomats and civil servants are marking time, at present, everywhere throughout the world, and maintaining, for the most part, a becoming silence. It is for the soldiers and the guns to speak, and until they have spoken effectually, all else must wait.

Passing now from these matters, arising directly out of the Firmans, to take a final glance at Egyptian administration as it still subsists, on the eve of coming changes, perhaps the most striking feature of the whole situation is the little outward difference which this momentous transformation of the political status of the country has so far occasioned. The Government administrations have continued, day by day, the routine of their daily work, with very little apparent alteration, either in their methods or the nature of their tasks, save in so far as some branches of their official activities have been modified or superseded by the military authorities, as a result of military exigencies. The law courts, both Mixed and Native, have continued to administer justice almost exactly as before—merely substituting the name of the Sultan for that

of the Khedive in their judgments—and applying a number of military proclamations and ordinances in lieu of, or in addition to, the ordinary legislation.

The business world has calmly proceeded with “business as usual” in a far more literal sense than has, at any time, been the case at home. Indeed, in scarcely any field of Egyptian public life is it easy to point to new phenomena which are directly attributable to the altered political status of the country. The reason for all this is, of course, that we have had a British Protectorate in Egypt, *de facto*, if not *de jure*, for the last five-and-thirty years; and as the above-mentioned technical restrictions on the powers of the Khedivial Government, though legally of great importance, were little apparent outwardly, their disappearance has scarcely stirred the surface of public life. In two directions only had very marked outward indications survived of the political dependence of Egypt upon Turkey. These were the religious tie, based on the Kaliphate, which bound the Mohammedans of Egypt to Constantinople; and the existence of the body of fiscal and judicial immunities, known as the Capitulations, which constituted foreigners in Egypt a kind of *imperium in imperio*.

Religious Affairs.—As regards the first of these matters, the allusion to the Kaliphate and religious affairs generally, in the despatch, will have been noted. Needless to say, there has been no attempt to interfere in any way with religious dogma or ceremonial. But the severance of political relations with Turkey has, nevertheless, had in religious affairs one profound and wholly beneficent effect. It has enabled the Egyptian Government to rid itself, once for all, of the Turkish Cadi, appointed by the Sultan and despatched from Constantinople, who was regarded as the head of the whole of the Mohammedan Courts of the country, who knew little or nothing of Egyptian conditions and affairs, who considered himself a representative of the Porte, and who publicly asserted his independence of the Egyptian Government and his emancipation from any kind of local administrative control. Such a man was, at certain times, a centre of dangerous Turkish intrigue, and almost at all times a thorn in the side of the Egyptian Government. I have given elsewhere¹ an account of the

¹ See *Nineteenth Century and After*, October 1916: “The Mohammedan Law Courts of Egypt: A Recent Chapter of Egyptian History.”

pernicious results which flowed directly from this lamentable state of affairs, and need not recur to it here. It is sufficient to record now that the dismissal of this functionary, which the outbreak of the war with Turkey rendered possible, has enabled the Egyptian Government to effect important administrative and organic changes in the religious Courts, long overdue, which have already had, in practice, the most favourable results.

Legal Reform.—As regards the other matter alluded to—that of the Capitulations—it will have been observed that the revision of this question was declared in the despatch to be “postponed until the end of the present war.” Meanwhile, the Consular and Religious Tribunals have been maintained, under a special law, and extraordinary Courts established for dealing with the affairs of such German and Austrian subjects as have been permitted to remain in the country. But in view of the above-implied engagement to deal with this important problem so soon as the conclusion of the war permits, the Egyptian Government has already taken measures to prepare the ground. An important Government Commission has been sitting for many months to consider all these matters, and it may be surmised that its labours are, as yet, far from terminated. The scope of its activities is a wide one,¹ for the network of the Capitulations extends to almost every branch of legislation, and any modification of its fundamental principles involves legislative changes in many directions.

A friend of mine recently suggested to me that I should write a book on Egyptian law. I can scarcely imagine a more futile occupation at the present moment. The whole public and private law of Egypt is in the melting-pot, and almost anything one wrote to-day would be in danger of being inaccurate or out of date when the book was published. Almost all the codes are—or were—more or less in process of revision by various Committees, and the whole legislative and judicial organisation of the country is coming up for examination and amendment by the above-mentioned Commission. No one knows what the outcome of this vast upheaval may be, nor how long it will take to subside. Possibly—in view of the great difficulties of the task—the event will, to some extent, justify the anticipations of the sceptics as to the hardy durability of the pro-

¹ I have recently given some account of this Commission: see *Fortnightly Review*, August 1917, pp. 232, 233. See also *infra*, p. 279.

visional in Egyptian affairs. But eventually it may be hoped that, as a result of the events of December 1914, which have already produced such beneficial effects in many directions, and are doubtless destined to produce many others, some of which can hardly be foreseen at present, the efforts of judicial reformers in Egypt for the last thirty years may at length be crowned with a substantial measure of success ; and that out of the tangle of international institutions and the mass of polyglot and exotic legislation which have cumbered the path, there may be evolved a permanent, homogeneous, and righteous system of law and justice, which will bring contentment to the people and serve as a sure foundation for the future happiness and prosperity of the new Protectorate.

NOTES ON INTERNATIONAL LAW.

Enemy Ships in Harbour at the Outbreak of the War.—That Convention VI. of the Hague Conference relative to days of grace to enemy vessels found in harbour at the outbreak of hostilities is unsatisfactory has been plain to every commentator upon its text ; and the experience of the war has confirmed adverse criticism. The Convention lays down no hard-and-fast rule ; it merely states that “ it is desirable ” that days of grace should be granted. Art. 6 adds that the Convention is applicable only between the contracting parties, and “ only if all the belligerents are parties to the Convention.” Whether China has signed the Convention seems uncertain. Germany declined to assent to the important Art. 3, and cannot therefore be said to be a party to the entire Convention. It has been decided by our Prize Courts that vessels which take refuge in British ports in order to escape capture are not protected by the Convention. Nor are vessels which, having been offered permission to leave along with a passport, do not avail themselves of this licence. It is fairly arguable that the reasons which led to the relaxation of the ancient practice of confiscation and to the granting of days of grace no longer hold good. Many merchant vessels can be readily converted into cruisers capable of doing great damage to commerce at sea, and many others might be useful in furnishing supplies to submarines or other war vessels. Much is to be said for the course which has been taken here with respect to German vessels. Actions were instituted by the Procurator-General for their condemnation. On proof of enemy character the judge declared the ship and cargo to belong, at the time of seizure, to enemies of the Crown, and ordered the ship to be delivered to the Marshal of the Court, and the freight (if any) to be paid into Court until further order ; that is, there was no final decree. Then the representative of the Admiralty may make an affidavit to the effect that the Admiralty desire to requisition the ship. Under Order

XXX. of the Prize Rules, 1914, the judge may order the ship to be delivered to the Admiralty upon payment into Court of its appraised value. If, however, it appears that the ship is required for the service of the Crown forthwith, he may order it to be delivered without appraisalment. The question of compensation and other outstanding matters are held over till after the war.

The British Government, it may be noted, detained few German vessels, except in Egypt. Most of them had received notice of coming hostilities, and left British waters in the last days of July or first days of August, 1914.

Treaties and Third States.—In the construction of international documents by lawyers of different countries, disagreement often arises because each, consciously or unconsciously, applies the rules or principles of the law with which he is most familiar. No better illustration of this fact could be found than in the tendency of English and American jurists to deny that persons or States not signatories to a treaty can acquire rights under it. They almost unfailingly apply the maxim of Roman law, which holds good in English law, *Pacta tertiis nec nocent nec prosunt*. And yet, as Mr. Ronald Roxburgh has shown, with no small acuteness and learning, in his valuable work just published, on *International Conventions and Third States*,¹ there is a large body of opinion in favour of the view that, while third States cannot incur obligations under a treaty, they may acquire rights. As to the circumstances under which such rights may be acquired, there is much diversity of opinion and practice. The result of Mr. Roxburgh's examination [pp. 111 *et seq.*] is to reveal a highly complex set of rules and exceptions in accordance with the municipal law, so far as we are aware, of no country. For centuries there have been "accession" or "adhesion clauses" in treaties, and yet, strange as it may seem, their exact legal effect is still uncertain.

The Immunity of Ambassadors.—The extraordinary Norwegian experience of the methods of German higher statecraft makes it necessary to dwell on the limitation of the immunity of ambassadors and their suites. The German Ambassador to the Norwegian Government was used as a safe medium for the conveyance to Norway of bombs and explosives to be used by German agents against neutral shipping passing between British and Norwegian

¹ Longmans, Green & Co.

ports. It is said that no less than 211 bombs were conveyed under the safe custody of the ambassador's bag. Among the many remarkable features of German attitude towards International Law is verbal respect for the letter and contempt for the spirit of the law. Herr von Bethmann-Hollweg expressed his distress in August 1914 that it had been necessary to break the Treaty by which Prussia guaranteed the inviolability of Belgium. He has recently expressed his concern that Mr. Gerard should have broken the practice of ambassadors in respect to discreet reticence as to the indiscreet utterances of emperors and others. But the thing that has shocked the German diplomatic mind more than anything else is the ruthless opening of an ambassador's bag full of bombs. The letter killeth, and that was exactly the intention in the most literal sense. It is true that the ambassador's bag has had a wide licence in all ages. Livy (i. 24) tells us that an ambassador is *jure gentium tutus*, and not only the ambassador but his bag and his bagmen: *vasa comitisque meos*. In far earlier days Xerxes put to shame the murderers of his envoys. Seneca, Cicero, and Justinian agreed with Livy that an ambassador was inviolate, but it is equally clear under Roman law that an ambassador, if he wished to escape the operation of the criminal law of his hosts, must remain a neutral, and Mommsen himself tells us that in Roman times an ambassador could not shelter criminals in his embassy. Dr. Phillipson makes this clear. Sir Erskine Holland, in his comments of November 1896 on the detention of Mr. Sun Yat Sen in the Chinese Legation in London, lays stress on the limitations of the extra-territoriality of an embassy and adds that the case of Gyllenburg in 1717 showed that if a minister is suspected of conspiring against the Government to which he is accredited he may be arrested and his cabinets ransacked. Mr. Hall says:

The house of a diplomatic agent is so far exempted from the operation of the territorial jurisdiction as is necessary to secure the free exercise of his functions. It is equally agreed that this immunity ceases to hold in those cases in which a Government is justified in arresting an ambassador and searching his papers: an immunity which exists for the purpose of securing the enjoyment of a privilege comes naturally to an end when a right of disregarding the privilege has arisen.

It arose when the ambassador's bag was filled with bombs.

Prisoners of War.—In her treatment of prisoners of war Germany has acted in marked contrast to her ally Austria. Whilst the latter, not unmindful of her traditional friendship with Great Britain, has treated British prisoners of war with strict correctitude, and even with generosity, Germany has broken every regulation relating to prisoners of war in the Hague Conventions and every precept of humanity which in modern warfare has guided the conduct of civilised States. In the field, troops which have surrendered have been shot in cold blood in batches and even wounded prisoners have shared a similar fate. Prisoners of war have been employed in the construction of military works, and in many instances on works within the firing line. The latter is alleged to have taken place by way of reprisal for similar action on the part of the Entente Powers, but no evidence of such action has so far been produced. Even in the internment camps we now know from Mr. Gerard that prisoners of war have been shot by their guards out of hand and from other sources that they have been subjected to atrocious punishment for trivial breaches of prison discipline. British and French prisoners have been carried to the Russian front to endure the rigours of a Russian winter, to toil in the trenches with inadequate shelter, without firing and with insufficient food. Of the scandal of the Wittenberg and Gardelegen camps it is difficult to write with composure. But for the good offices of the American and Spanish ambassadors, the conditions of our prisoners in Germany would undoubtedly have been even more intolerable.

These instances, even if exceptional, constitute a black record in the history of a civilised state. To find a parallel one must go to the East. At first Germany attempted to justify her conduct in the treatment of British prisoners by alleging ill-treatment of German prisoners in Great Britain. After a thorough inquiry undertaken by neutral investigators, these charges fell to the ground. For the supply of insufficient or inferior food to her prisoners, some excuse may be found in the general food shortage in Germany. But for inadequate and insanitary housing and neglect of the sick, no such excuse is possible.

The history of the treatment of prisoners of war is painful reading. With some set-backs it has been an orderly evolution from cannibalism, wholesale massacre, slavery and ransom to confinement under tolerable conditions and unconditional release upon the

conclusion of the war. The experience of the present war would appear to show that the present regulations have proved inadequate. The food deficiency produced by modern blockades perhaps renders one form of suffering inevitable. The possible callousness, if not the active hostility, such as has been exhibited by large sections of the German people to the condition of their helpless captives, also imperils the fair and decent treatment of these unhappy individuals. An entire change of system would appear to be required. Some tentative steps in this direction have already been taken.

Recent Negotiations.—After protracted negotiation the British Government succeeded in arranging with the German authorities for the exchange of wounded or sick prisoners who had been rendered permanently incapacitated for further service in the field. Many of these unfortunates have been repatriated. Later an agreement was reached with the German Government for the transfer of British and German wounded and sick prisoners to Switzerland on the lines of the agreement already in force between the French and German Governments. By this arrangement all prisoners of war held by the British and German authorities suffering from certain maladies specified in the schedule annexed to the agreement, but who were not sufficiently incapacitated to justify repatriation, were to be transferred to Switzerland, there to be interned for the duration of the war.¹ For some time this arrangement ceased to be carried into effect.

New Convention.—By the Hague Convention recently concluded between the British and German Governments all existing agreements are to be resumed as quickly as possible and more lenient schedules of disability in respect both of exchange and internment in neutral countries were agreed upon. Additional prisoners are to be sent to Switzerland and a certain number in that country to be repatriated in order to make room for the new arrivals. The Netherlands Government having offered to find accommodation for 16,000 persons, it is agreed that 7,500 places be allotted to invalid combatants, 6,500 to officers and non-commissioned officers who have been eighteen months in captivity, and 2,000 to civilian invalids. In his speech in the House of Lords, Lord Newton explained that it had been found impossible to include privates in the second category. In the first place, had they been included, there would have been

¹ *Parliamentary Paper* (Cd. 8236), Miscell. No. 17 (1916).

no room for any one else, and secondly, the German Government refused to give up any one out of whom they could get any work. Of the 2,000 civilian invalids, 1,600 were to be German, and only 400 British. Lord Newton contended that this was not unfair, as there were something like six or seven times as many German civilians in this country as British civilians in Germany. Other agreements related to punishments. These are to be greatly reduced. All British prisoners confined for attempted escape have since been released. Further, all punishments upon either civilian or military prisoners inflicted prior to August 1 are to be remitted. It is interesting to find that both parties of delegates agreed that reprisals ought to be avoided as much as possible. The opinion was expressed that reprisals were perhaps most objectionable in the case of defenceless prisoners. It was agreed that reprisals should only take place after at least four weeks' notice. Other agreements reached related to the more speedy delivery of parcels, the relaxation of the censorship, and the delay in bringing prisoners to trial.

Repatriation.—Unfortunately a hitch has already occurred in the repatriation of prisoners. For some unexplained reason the German Government has refused to accept Hull as a port of embarkation and disembarkation. It demands Southwold for this purpose, a port entirely unsuitable for wounded and invalids, both on account of poor landing facilities and want of suitable railway transport. In the exchange of civilian prisoners Lord Newton said the delegates had found it impossible to come to any agreement. Germany would only consent to an exchange on the lines of "all for all" and this he was prevented from accepting by his instructions. It may be contended that these instructions were a mistake. By the release of 26,000 civilians we might, it is true, increase the military strength of Germany, but on the present colossal scale of armies, even if they were all of military value, this addition would be almost imperceptible. It is doubtful, however, if one-third would possess any such value, and we should at the same time be relieved of the maintenance and custody of a considerable number of persons. Above all we should release 4,000 British subjects, who have already endured over three years' penal servitude, through no fault of their own.

Further Measures Necessary.—At a conference of delegates from the Austro-Hungarian and Russian Red Cross Societies, held under

the Presidency of Prince Carl of Sweden, a convention has been concluded whereby all prisoners of war suffering from phthisis or other serious illness and all over sixty are to be exchanged.

Admirable as all these steps are, obviously they are inadequate in modern warfare. They are, however, in the right direction. The repatriation of all prisoners permanently disabled should be enforced, as already provided by Art. 6 of the Geneva Convention, 1864. All sick and wounded should be transferred to the care and custody of neutral States and maintained at the expense of their own country. Whether it would be possible to carry out the internment of the captured rank and file in neutral countries we cannot attempt to decide, but the question cannot be left where it is. That a belligerent should have it in his power to underfeed, overwork, and underpay prisoners of war, house them in insanitary and overcrowded huts or stables, employ them on military works often exposed to the enemy's fire, is intolerable. Such treatment a soldier must expect from uncivilised peoples. By the treatment of her unfortunate prisoners of war Germany has shown that her *Kultur* is only skin-deep; she has become the exponent of the worst forms of oriental cruelty.

The Position of International Rivers—Influence of Customs on Treaties—In Mr. Roxburgh's volume ¹ are some judicious remarks as to the position of so-called international rivers, a question which, it is probable, will, in the near future, become much more important than, so far, it has been. During last century, beginning with the final Act of the Vienna Congress in 1815, treaties have recognised rights of navigation over many of the chief rivers of the world (*e.g.* the Rhine, Elbe, Danube, Parana, Amazon, Congo, and Niger). "Can it be said," asks Mr. Roxburgh, "that these treaties, considered in the aggregate, and taken in conjunction with other circumstances, either prove or create a rule of law whereby all States, *apart from treaty*, are entitled to enjoy freedom of commercial navigation on any and every international river?" Mr. Roxburgh answers this general question in the negative. But he proceeds to qualify this by saying that "each particular case depends upon its own particular facts," and this qualification is in its turn qualified by adding that "any attempt to close one of these rivers to a non-

¹ *International Conventions and Third States*. By F. R. Roxburgh. (London: Longmans.)

signatory Power would be almost universally regarded as an infringement of right" and that "no attempt has been made by the parties to any of those treaties to differentiate unfavourably against third States."

The impression left by Mr. Roxburgh's excellent discussion of this point and some others akin to it, especially as to the effect of "accession" to treaties in international law, is that there cannot too soon be an end of ambiguity on this subject. Either States have or have not "acceded" and so become parties to treaties. The doctrine that they can somehow gradually and tacitly obtain the advantage of treaties without incurring obligations incident thereto is loose and dangerous. Nothing can well be more unsatisfactory than the theory that nations acquire by tacit consent all the rights of an agreement to which they are strangers. To narrow the area of "tacit consent" is, in international as well as in private affairs, to limit the opportunities of quarrels. Parenthetically we may here remark that in the recent prize case, *The Steamship Hakan*, there are some interesting observations by the President and the Judicial Committee of the Privy Council on the consent necessary to constitute a rule of international law.

NOTES ON CASES.

ENGLAND.

[Contributed by EDWARD MANSON, ESQ.]

Customer facilitating Fraud on Bank.—The customer of a bank, it has long been recognised, owes a duty to the bank—a duty in drawing cheques not to mislead the bank: for instance, by writing so badly that a cashier might justifiably read a cheque as authorising payment of a larger sum than the customer intended,¹ but it seems from the recent decision of the Court of Appeal in 1917, *Macmillan v. London Joint Stock Bank*,² that a customer commits no breach of such duty by drawing a cheque so carelessly as to facilitate a fraud by a person into whose hands the cheque passes. In the above case the cheque was drawn by a confidential clerk of the customer for petty cash and brought to the customer for signature. The amount was not entered in words, but only in figures—£2. After signature the clerk fraudulently filled in the cheque with the words “one hundred and twenty pounds,” and introduced figures in the figure space to make it correspond. The bank cashed the cheque, and claimed to charge it against the customer’s account. The clerk had absconded. The general rule of law is that stated by Ashurst J. in *Lickbarrow v. Mason*,³ “Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.” It is evident that so far as the bank was concerned it was quite innocent in the matter. The cheque was on the face of it strictly in order, and the bank was bound to honour it. The customer on his part was equally innocent of any intention of committing a fraud, but he had supplied his clerk with “the

¹ *Ireland v. Livingston*, L.R. 5 H.L. 395. ² 2 K.B. 439. ³ 2 T.R. 63, 70.

means to do ill deeds." "The law stands thus," said Fletcher Moulton L.J. in *Smith v. Prosser*¹: "If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument." That is what the customer had done: he had given the incomplete cheque to his clerk, and had not limited the clerk's power in any way obvious on the face of the instrument. The cheque when filled in became his genuine order. He had thus, within Ashurst J.'s words, "enabled the third person"—the clerk—"to occasion the loss." Why should he not sustain the loss? The Court of Appeal was at great pains to distinguish or discredit *Young v. Grote*,² a case very similar in its facts to the one under consideration, but the occasional criticisms to which that case has been subjected cannot countervail the approval of it as a binding authority by a long succession of eminent judges.

Christianity and the Policy of the Law.—The appeal in *The Secular Society v. Case*³ has produced some interesting judgments by the Law Lords, dealing with the much vexed question whether or in what sense Christianity is part of the common law of England. The main object of the Society, as stated by its memorandum of association, was: "To promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action." And the question was whether a Society professing such principles could claim the benefit of a legacy given to the Society. The Lord Chancellor was of opinion that it could not, but the other Law Lords held that even assuming the objects of the Society to involve a denial of Christianity, they were not illegal, so as to render the Society incapable in law of taking the legacy. "One asks," said Lord Sumner, "what part of our law may Christianity be and what part of Christianity may it be that is part of our law?" The answer may be that it was the informing and inspiring influence of Christianity (not necessarily of the Established Church) which was in the minds of great judges like Lord Hale and Lord Hardwicke, Lord Mansfield and Lord Eldon, when they said that Christianity was part of the law of the land. It was no mere

¹ [1907] 2 K.B. 752.² 4 Bing. 253.³ [1917] A.C. 406.

“ rhetoric,” but historic fact. It must now be taken that our law, so far from recognising Christianity as part of the law, adopts an attitude of neutrality towards it, and will enforce payment of a legacy though the money is to be employed in undermining the principles of Christianity.

Certificate of Incorporation : Legality of Objects.—A subordinate point, but one of interest to persons concerned with companies, was cleared up in the same appeal. S. 1 of the Companies Act, 1900, reproduced in the Companies (Consolidation) Act, 1908, s. 18, provides that a company’s certificate of incorporation “ shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with . . . and that the association is a company authorised to be registered and duly registered under the Act.”

Counsel for the Secular Society pressed this section into the service of his argument, contending it made the Society’s certificate conclusive as to the legality of the Society’s objects, but the Lord Chancellor and Lord Parker of Waddington exposed the fallacy—the certificate is only conclusive as to incorporation ; the legality of the company must be judged by its powers as expressed in its memorandum of association. If these are illegal the remedy is the recall of the certificate—by proceedings instituted by the Attorney-General by way of *certiorari* to cancel the registration.

Yew-tree Poisoning of a Tenant’s Horses.—It is not for the first time that the poisoning of horses or cattle by eating yew trees on adjoining land has come before the Courts : witness *Crowhurst v. Amersham Burial Board* ¹ and *Smith v. Giddy*.² But both of these were cases of parties holding under independent titles. In *Cheator v. Cater* ³ the relation was that of landlord and tenant. Did this relation—there being nothing special in the terms of the letting—make any difference ? Coleridge J. thought it did not. Rowlatt J. thought it did. The tenant’s proposition was that the landlord had brought or kept on his land a nuisance in the shape of a poisonous yew tree within the doctrine of *Rylands v. Fletcher* ⁴ : and that he—the landlord—could not let his farm and then endanger the tenant’s stock. The landlord met this with the principle *Caveat emptor* : the tenant took the demised premises as they were with the yew tree

¹ [1878] 4 Ex.D. 5.

² [1894] 2 Q.B. 281.

³ [1917] 2 K.B. 516.

⁴ L.R. 3 H.L. 330.

in situ. He might have taken a warranty from the landlord, but he did not : and in support of this he cited a dictum of Mellish L.J. in *Erskine v. Adeane*,¹ where that learned Lord Justice said : “ The law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is ‘ Caveat emptor,’ so in the case of taking the lease of property the rule is ‘ Caveat lessee ’—he must take the property as he finds it. I never heard that a landlord warranted that the sheep should not eat his yew trees.” This dictum of the Lord Justice assumes, however, that the yew tree or other nuisance was on the demised premises at the date of the lease, and a source of danger. In fact, in *Cheator v. Cater* the yew was at the commencement of the tenancy beyond the reach of horses or cattle, but during the tenancy it grew so as to overhang the fence and, from being harmless, became harmful. That effectually distinguishes the dictum. Of course, if the horses or cattle eat the yew leaves by putting their heads over the boundary, that is trespass, and the owner is not liable : *Ponting v. Noakes*.²

Innkeeper's Liability for a Guest's Personal Safety.—A single lady arrives late at an hotel, and is shown at once to her bedroom on the second floor, ascending by the lift, so that she is ignorant of the whereabouts of the staircase. During the night a fire breaks out on the fourth floor and spreads rapidly—the roar of the flames being heard through the building. The lady knots the blankets and sheets together, but in descending by this improvised rope, unfortunately faints, falls heavily upon a glass roof below, and sustains injuries of a most serious character. The fire arose by reason of the ignition of a beam of wood facing the lift shaft in the centre of the hotel. The ignition was caused through a defective scheme for conveying the smoke and burning soot from the kitchen chimney. The landlord did not know of the scheme, which was carried out by the architect and builder of the hotel. The result was that the premises were not as safe as reasonable care and skill could make them. Was the lady under these circumstances entitled to recover from the landlord the damages (£865) which the jury had awarded her? McCardie J. was of opinion that she was.

The guest is an invitee of the innkeeper, and the innkeeper, as the occupier of premises to which he has invited the guest, is bound as a

¹ L.R. 8 Ch. 756.

² [1894] 2 Q.B. 281.

matter of common law duty to take reasonable care to prevent damage to the guest from unusual danger, which as occupier he knows or ought to know of. This is the ordinary liability in tort, but both Sir Frederick Pollock in his *Law of Torts*¹ and Bigham J. in *Marney v. Scott*² seem to think there is no difference between tort and contract for this purpose. The judgments, however, of the Court of Exchequer in *Francis v. Corkrell*³ carry the liability in contract a good deal further. They decide that a person who sells a ticket to another for a seat at a race stand, which he has caused to be erected by an independent contractor, warrants that the stand is reasonably fit for the purpose for which it is to be used—apart from defects which no reasonable care could have discovered. The same principle was applied to the hire of a carriage in *Hyman v. Nye*,⁴ and in *Cox v. Coulson*⁵ to the hire of a seat at a theatre. Why should not hotel premises be liable to the same rule?

McCardie J. has held that they are : that there is a warranty implied by law on the part of an innkeeper that his hotel is as safe as reasonable skill and care can make it. The rule so laid down puts on the defendant a greater obligation than exists with regard to a mere invitee, but a less obligation than is imposed on a man who sells a chattel to another for a specific purpose.

It is a curious thing that our law is less careful of a guest's personal safety than of his goods ; owing, it has been suggested, to the prevalence in old times of highway robbery and the frequent complicity between robber and innkeeper. Now that a guest much prefers his personal safety to his luggage, it is quite time to redress the balance.

¹ 10th ed. pp. 530-38.

³ L.R. 5 Q.B. 501.

⁵ [1910] 2 K.B. 177.

² [1899] 1 Q.B. 989.

⁴ 6 Q.B.D. 685.

AUSTRALIA.

[Contributed by J. E. HOGG, Esq.]

Life Insurance by Bankrupt.—The New South Wales case of *Re Rygate*, already noticed,¹ was taken on appeal to the High Court of Australia,² the appellant being the official assignee in bankruptcy of the estate of the insured, and the respondent the insured's administrator. The decision below was (by a majority of three to two) reversed, and the official assignee held entitled to the proceeds of the policy. The ground of this decision was that "the statute protecting life insurance policies against creditors had no application to policies effected whilst the insured was actually an uncertificated bankrupt." The difference of opinion turned on the construction of the statute, the majority holding that the proviso which required a policy to be in force for at least two years before being protected effectually prevented a person actually bankrupt from acquiring any interest in the policy at all.

Owner in Equity.—In *Redman v. Permanent Trustee Co.*³ the High Court of Australia had before them a case of an appointment invalid as being a fraud on the power. The rights of an assignee in equity also came up for consideration, and the observation of Isaacs J. as to this is worth quoting: "The whole doctrine of equity that a party to a contract is the owner of the property he has bought rests on the principle that equity will enforce the contract," and a recent judgment of the Privy Council delivered by Lord Parker is referred to.⁴ It is satisfactory to have this clear statement made in an Australian Court, because in a well-known case in South Australia (though some years ago) the right to specific per-

¹ (1916) 16 S.R. (N.S.W.) 129; *supra*, *Journal*, p. 118.

² *Sub nom. Palmer v. Public Trustee*, (1916) 21 C.L.R. 645.

³ (1916) 22 C.L.R. 84.

⁴ *Central Trust and Safe Deposit Co. v. Snider*, [1916] A.C. 266, 272. See also *Howard v. Miller*, [1915] A.C. 318, 326.

formance was said to depend on an equitable estate having passed by the contract.¹

The Copyright Act, 1911.—An Australian case—*Robinson v. Sands and M'Dougall*²—illustrates the advantage of a common law of copyright for the Empire. Though the Copyright Act, 1911, has in a very cumbersome way been placed on the Australian statute book by being made a schedule to a local statute, yet it is the Imperial Act that is in force, and the present case is a clear-cut decision on the Imperial Act itself. The main question before the Court was whether a claim to copyright in a map could be upheld, and an incidental question was whether a map compiled from existing sources of information open to all was “original”—as required by the new statute. It was held that the map was “original” and that the claim to copyright in it was good. The case may usefully be added to the few English cases (cited in the Australian report) on the word “original.” So far as the cases at present decided go, the introduction into the Act of 1911 of the word “original” seems to have made no difference in the law of copyright.

Statutory Avoidance of Contracts.—The Wheat Acquisition Act, 1914, of New South Wales has again been under the consideration of the High Court of Australia. In *Delaney v. Great Western Milling Co.*³ the question was as to the effect of the Act on the rights of a person who was not a resident of the State of New South Wales, and one result was to disclose a difference of opinion among the five judges who heard the case. The appellant had, prior to December 1914, entered into a contract with the respondents for the purchase of certain wheat in New South Wales, and had received as part payment £150. The appellant was a resident of Victoria, but the contract was actually made in New South Wales. In December 1914 the Wheat Acquisition Act was passed by the New South Wales Legislature, under which Act the contract referred to became “void and of no effect,” and the Act went on to declare that “any money paid in respect of” such a contract “shall be repaid.” Thereupon the respondents sued in the New South Wales Courts for the £150 paid to the appellant, and were held entitled to recover. The appellant appealed to the High Court of Australia, and the judgment of the New South Wales Supreme Court was upheld by a

¹ *Lange v. Ruwoldt* (1876) 6 S.A.R. 75.

² (1916) 22 C.L.R. 124.

³ *Ibid.* 150.

majority of three to two, the two senior judges dissenting. The view of the dissentient judges was that the New South Wales legislature could not by *ex post facto* legislation impose a liability upon a person not ordinarily amenable to New South Wales law. The majority thought that the appellant having made the contract in New South Wales was amenable to any statute which the New South Wales legislature was competent to enact relating to the contract. The difference of opinion really turned on the question of applying the principles laid down in the cases of *Macleod v. Attorney-General*¹ and *Ashbury v. Ellis*²—or perhaps of determining what principles exactly were laid down in those cases.

Payment by Company—Capital or Income.—In *Knowles v. Ballarat Trustees Co.*³ the High Court of Australia had to deal with a question similar to that which arose in *Bouch v. Sproule*⁴—whether a payment by a company to trustees was to be treated as capital or income. The English case was discussed and distinguished, and, as in that case, there was a difference of judicial opinion. In the present case the payment was made by way of “distribution of assets,” and was held to be a payment of capital. As in several recent Australian cases, the cause of judicial differences of opinion was the difficulty of agreeing on what really had been decided and laid down as law in an English case admittedly binding in the Australian Courts.

INDIA.

[Contributed by SIR E. J. TREVELYAN.]

Minerals.—In *Sashi Bhusan Misra v. Raja Jyoti Prashad Singh Deo*¹ the Judicial Committee have made it quite clear that the right to minerals is in the zemindar (the superior holder) and “that when a grant is made by a zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.” Now that the mineral resources of British India are being realised, and that there is a

¹ (1891) A.C. 455.

² (1916) 16 C.L.R. 712.

³ (1916) 44 L.R.I. 36.

⁴ (1893) A.C. 339.

⁵ (1887) 12 A.C. 385.

likelihood in the near future that much will be done by private enterprise to work Indian minerals, this decision is of considerable importance.

The complexity of Indian tenures and the consequent probability of litigation put great difficulty in the way of the acquisition of land for mining.

Duty of Counsel for Appellant.—In a recent case (*Demandam Prashad v. Janki Singh*)¹ Sir Lawrence Jenkins in delivering the judgment of the Judicial Committee of the Privy Council referred to a decision published in the *Calcutta Weekly Notes* and added: "This case was not cited in the course of the argument, as the respondents were not represented, but their Lordships wish it to be distinctly understood that when an appeal is heard *ex parte* it is the duty of counsel to bring to the notice of the Board adverse as well as favourable authorities." To what extent is this duty of counsel to extend? There are a vast number of Law Reports published in India. The Legislature has provided in the Indian Law Reports Act, 1875,² s. 3, that "no Court shall be bound to have cited, or shall receive or treat as an authority binding on it, the report of any case decided by any of the said High Courts . . . other than a report published under the authority of the Governor-General in Council." The *Calcutta Weekly Notes*, although it is an excellent and useful publication, is not published under the authority of the Governor-General in Council. The decision referred to was not reported in the authorised reports. So although the Indian Courts are not allowed to treat decisions not reported in the authorised reports as binding on them, the Judicial Committee requires counsel to place those decisions before it. The task of counsel will be considerably increased, if in every case a search is to be made throughout the many sets of Indian Reports, most of which are inaccessible to practitioners in England, and in many cases the time of the Judicial Committee would be wasted in the discussion of decisions of little, if any, authority.

Female Lawyers.—A Bench of five Judges of the High Court of Bengal has recently considered an application by a Bengali lady named Regina Guha to be admitted a pleader of the Court of the District Judge of Alipur, which is subordinate to the Bengal High Court.³

The learned Judges came unanimously to the conclusion that

¹ (1916) 21 Calc.W.N. 473.

² Act XVIII. of 1875.

³ I.L.R. 44 Calc. 290.

men only are entitled to be admitted as pleaders. The lady in question was, except in the matter of sex, completely qualified to be admitted under the terms of the rules framed under the Legal Practitioners Act.¹ The arguments placed before the Court were practically the same as those which were rejected by the Chancery Division in *Bebb v. Law Society*.²

It was contended that as under the terms of the General Clauses Act (Indian Act of 1897, s. 13) "words importing the masculine gender shall be taken to include female," the rules under the Indian Practitioners Act, although referring in terms to men only, included women. It is a question whether the provisions of the General Clauses Act 1897 are applicable to rules even when such rules have statutory force, but it was unnecessary to decide that question.

At the time the Legal Practitioners Act was passed there had never been a case of a lady being allowed to practise in an Indian Court. The Legal Practitioners Act made no reference to women. The Court held that the above-quoted provision in the General Clauses Act, which was also to be found in the earlier General Clauses Act of 1868, was not intended to affect the existing law and practice with regard to the admission of legal practitioners. If such an alteration had been intended, express provision would have been made.

There can be no doubt that the law laid down by the learned Judges is sound, but there is an aspect of the case which would show that the matter is worth the attention of the Legislature. As is well known, Indian ladies of position and means confine themselves to the recesses of the female apartments of their houses, and hold no direct communication with the outside world. For the management of their business affairs they are dependent upon their relations and servants. The records of the Courts show how frequently the trust which they are compelled to impose on others is abused. If it were possible for ladies with a competent knowledge of the law to be recognised by the Courts, these ladies would be able to hold direct communication with their female clients, would frequently prevent fraud, and what is equally important would give their clients confidence in the law.

Appeals in Criminal Cases to His Majesty in Council.—The Judicial Committee has again laid down in clear words the limitation of

¹ Indian Act XVIII. of 1879.

² [1914] 1 Ch. 286.

their function as a Court of Criminal Appeal. In *Dal Singh v. The King-Emperor*,¹ Lord Haldane said: "It is well settled that the unwritten principles of the Constitution restrain the Judicial Committee from being used in general as a Court of review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the Court below has come to a proper conclusion as to guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice. . . . Before considering the result it is right that they should state what they conceive to be, in a case such as that before them, the character of the limitation of their function. The Constitution of the Empire is tending to develop in the direction of regarding as final decisions given in the local administration of criminal justice. The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only when it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as, for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below."

This expresses in somewhat different language the principles laid down in *Arnold v. The King-Emperor*, (1914) 41 I.A. 149, and cases there cited.

¹ (1917) L.R. 44 I.A. at p. 140.

NOTES.

Judicial Reorganisation in Egypt.—Sir W. Brunyate in his first report as Judicial Adviser deals with some of the changes which may be expected to follow upon the altered position of Egypt. It may be remembered that, upon the occasion of the declaration of the British Protectorate, the Government made it known that they regarded the end of the war as the proper occasion for taking up the question of the disappearance of the Capitulations. A strong Commission¹ has been set up to study the reforms which such disappearance will call for, whether in judicial organisation or in legislation and administration generally.

The Judicial Adviser does not attempt to anticipate the recommendations of the Commission, but there are some points which he submits for general consideration.

It is [he thinks] clear that, if the efficient dispatch of legal business is to be assured, some fusion of our different systems of Courts must take place; but it in no way follows—and, so far as I am aware, enlightened Egyptian opinion does not desire—that such reasonable safeguards as may be compatible with the efficient working of unified Courts should be withdrawn from foreigners. The Mixed Tribunals, as they exist at present, are apt to be regarded as the natural protectors of the rights of foreigners against arbitrary administrative action; but I cannot help thinking that their wide jurisdiction to entertain claims against the Government is at least as much due to the desire of their founders to protect the Government against unreasonable claims presented through diplomatic channels. I should be inclined to say that the type of diplomatic claim which was once characteristic of Egypt was long since dead, had I not occasionally come across examples of such claims in the course of my professional experience. But, even were they animated by no higher motives, the authorities who are ultimately responsible for the

¹ The Commission, which was set up by Decision of the Council of Ministers, dated March 24, 1917, is composed of Their Excellencies Youssef Pasha Wahba, Minister of Finance; Adly Yeghen Pasha, Minister of Education; Abdel Khalek Saroit Pasha, Minister of Justice; Mr. Lindsay, Acting Financial Adviser; Sir William Brunyate, Judicial Adviser; Mr. Haines, Adviser of the Interior; M. Laloë, Vice-President of the Mixed Court of Appeal; and M. Piola Caselli, Counsel to H.H. the Sultan.

administration of justice have a direct interest in providing Courts of a kind to inspire confidence amongst the foreign community.

The position of the Bar to some extent reflects that of the interests it represents, and I have some reason for believing that both the Mixed and the Native Bars feel some apprehensions as to the possible results of fusion. I am convinced not only that such apprehensions are without serious foundation, but that each section of the Bar has something to gain from more intimate relations with the other. The progress made by the Native Bar within my own experience has been very striking, but, taken as a whole, it has, I think, something to learn from association with the leaders of the Mixed Bar. On the other hand, I cannot think it to be to the interest of the Mixed Bar to be cut off, as it is at present, from all contact with some of the most important elements of Egyptian life. But, most of all, I conceive the existing state of division to be harmful as being in large part artificial. For the Bar, criminal cases apart, is, after all, only an adjunct of the commercial and economic activities of the country, and these activities cannot be divided up into water-tight compartments. I would only add that, if the Mixed elements in the Bar are afraid of being swamped by mere numbers, it would appear to me reasonable that, as a transitional measure, special and adequate representation should be assured to them in any professional governing body or bodies. I use the words "as a transitional measure" because any permanent differentiation appears to me contrary to the fundamental principles of the profession. If, as I am bound to assume, we are to have a living Bar, its leaders will, in the long run, hold their position by personal merit and not by special privilege.

As regards the type of law to be applied by unified Courts, there is, I think, one consideration which is almost decisive. One system of law may be theoretically better or less good than another; but no system can be a success which is not understood by the professional men, whether judges or advocates, responsible for its administration. For that reason, if for no other, I should assume that the future law of Egypt must take as its starting-point the law at present administered by the Mixed and Native Tribunals.

But, when we come to take stock of our existing law, I am no less convinced that we shall find both many gaps to be filled and many defects to be remedied. The defects are, indeed, admitted; the gaps, patent. And, there, I conceive that, in view of the new political status of the country, we shall be bound to consider very carefully what help we can get from the many precedents offered us by the legislation of the British Empire.

What, it may be asked, will be the ultimate result of such a process of revision? My answer is that, with any success, it will, in no long time, be an organic body of Egyptian Law and procedure, such as cannot be said to exist at the present time. Lest it be suggested that, in becoming

Egyptian, the system of law would be cut off from the families of French and English Law, alike—for we shall be exposed to criticism from one direction no less than from the other—I would observe that, in the course of some twenty years' experience, I have found that, historical accidents apart, the differences between large portions of French and English Law are little greater than is necessarily incident to the expression of the legal concepts of one country in the language of another.

The Torrens System of Land Title Registration.—The following instructive note is from the *Columbia Law Review*, April 1917. It may be observed that the reference to the English land registration system is somewhat inadequate and misleading, and no mention is made of the English automatic registration of copyhold titles still in active operation and extending back for many centuries.

Conveyancing in England was originally by physical transfer of all the title-deeds, including one from the seller to the purchaser; a crude method, but with the advantages of being cheap, safe, and secret.¹ In the United States, however, it was early replaced by the recording system, under which title papers are transcribed at length on the public records of the county in which the land lies, and thereupon become constructive notice of the claims which they represent to all who deal with the property.² To-day a new method—that of land title registration, which bears the name of its inventor, Sir Robert Richard Torrens, once Premier and Registrar-General of South Australia—bids fair to replace the recording system, and has already been recognised by law in fourteen American states,³ Hawaii,⁴ and the Philippines,⁵ besides being in almost universal operation in the British colonies.⁶

¹ Niblack, *Analysis of the Torrens System*, s. 2; Torrens, *Essay on the Transfer of Land by Registration*, 9-10.

² See 8 *Columbia Law Rev.* 441-3; Niblack, *op. cit.* s. 3.

³ Deering's Gen. Laws Cal. 1915, Act 1049; Mills, Ann. Stat. Colo. 1912, ss. 856-957; Hurd's Rev. Stat. Ill. 1915-16, pp. 608-6; Mass. Rev. Laws 1902, pp. 1228-58, 1770, as amended by Supplement 1902-08, pp. 1250-7, 1399, and also Acts 1910, c. 245, 560, Acts 1911, c. 433, Acts 1915, c. 290; Gen. Stat. Minn. 1913, ss. 6868-950, as amended by Sess. Laws 1915, c. 242; Laws Miss. 1914, c. 131; Neb. Laws 1915, c. 225; N.Y. Consol. Laws 1909, ss. 370-435 of Real Prop. Law, as amended by Laws 1910, c. 627, Laws 1916, c. 547; Pub. Laws No. Car. 1913, c. 90, as amended by Pub. Laws 1915, c. 128, 245; Page & Adams Ann. Ohio Gen. Code, Supplement 1916, ss. 8572-118; Lord's Ore. Laws 1909, ss. 7179-285, as amended by Gen. Laws 1911, c. 276, Gen. Laws 1913, c. 60; Laws So. Car. 1916, No. 550; Va. Acts 1916, c. 62; Remington & Ballinger's Ann. Wash. Codes 1910, ss. 8806-905.

⁴ Rev. Laws Hawaii 1915, ss. 3133-242.

⁵ Compilation Laws Philippine Islands 1908, pp. 777-820, as amended by Code Civ. Proc. 1914, pp. 368-72.

⁶ South Australia (1858), Queensland (1861), Victoria (1862), New South Wales

The disadvantages of the recording system lie in the fearfully complicated state of the record title of land which is frequently conveyed or encumbered, and the constant liability of the owner to suits on both recorded and unrecorded claims.¹ The purchaser of realty, to obtain even reasonable protection, must procure the services of a searcher to prepare an abstract of all the deeds, mortgages, *lis pendens*, and other documents affecting the property recorded in the county court-house for years back; and he must also procure an attorney's opinion on the validity of those instruments as affecting the legal status of the title; or he may accept the doubtful security of a warranty deed.² Even the utmost precautions cannot assure him an indefeasible title; unsuspected claims, such as the dower right of unknown widows, may arise to cast a cloud upon it.³

The Torrens system of land title registration wholly does away with the accumulation of hoary documents, and provides for the dedication of one folium of the register to each particular title, on which only memoranda of valid and existing liens and claims are kept recorded.⁴ It has been defined as a system of registering land which registers title instead of instruments as evidences of title.⁵ When a mortgage debt is paid, the memorial of it is wholly cancelled; when the land is conveyed to a new owner, a fresh certificate is issued, and in every case the person entitled receives a duplicate of the recorded certificate. When the original registration under a Torrens law is accomplished, notice is given by service and publication of all whom it may concern, and claims not proved within a stated period are barred as by the running of a short statute of limitations. Under the typical Torrens law, to be sure, the State voluntarily maintains an assurance or indemnity fund, supported by fees on registration, to reimburse those whose claims were cut off by error, omission, maladministration on the part of the registrar, etc.; but the

(1862), Tasmania (1862), New Zealand (1870), British Columbia (1870), West Australia (1874), Fiji (1876), Bengal (1876), Ontario (1885), Manitoba (1885), Canadian Territories (1886), British New Guinea (1889), Nova Scotia (1904), Falkland Islands (1904), Alberta (1906), Uganda Protectorate (1908), Saskatchewan (1909), Transvaal (1909), etc. etc. See Hunter, *Torrens Title Cases*, pp. xxv-xxxiii; Thom, *Canadian Torrens System*, pp. 9-10, 24-9; also statutory compilations. In England itself, after the failure of compromise legislation, a reasonably adequate Torrens law was adopted in 1897: 60 & 61 Vict. c. 65. Various kinds of land title registration, long antedating the Torrens system and more or less closely resembling it, are in force in some German and other Continental jurisdictions. Torrens, *op. cit.* 9.

¹ Cameron, *The Torrens System*, 58-60.

² See *The Torrens Land Transfer Act of Nebraska*, Nebraska History and Political Science Series, Bulletin No. 10, pp. 21-22; Hopper, *Sketch of the Torrens System of Land Title Registration* (2nd ed. 1916), 13-14.

³ See 8 *Columbia Law Rev.* 442.

⁴ Torrens, *op. cit.* 22; Hopper, *op. cit.* 14.

⁵ Cameron, *op. cit.* 11.

registered holder takes free from all such claims, his title being guaranteed indefeasible by the sovereignty which is the source of all titles.¹

The introduction of the Torrens system into the United States has been vigorously opposed by title insurance companies, professional searchers, and others who profit by the confusion and uncertainty inseparable from the old methods.² At first, the efforts of these interests were crowned with success, the first two Torrens laws—the Illinois Act of 1895 and the Ohio Act of 1896—having been held unconstitutional;³ but later enactments, adapted to the peculiar requirements of our constitutional system, and containing all the essential elements of true Torrens laws, have repeatedly withstood attack.⁴ To-day the principle of land title registration is firmly entrenched, and has found such favour with the best element of the legal profession that the American Bar Association has not only put itself on record as favouring the idea, but through a special Torrens committee has submitted a Model Act, prepared by the Commissioners on Uniform State Laws, which it recommends for general adoption.⁵

American Torrens laws have many features in common. Under all of them, registration of title is optional in the first instance;⁶ but,

¹ Torrens, *op. cit.* 18 *et seq.*

² Cameron, *op. cit.* 64-5, 102, 106; Hopper, *op. cit.* 18.

³ The Illinois law was held invalid on the ground that it conferred judicial powers on the recorder: *People v. Chase*, (1896) 165 Ill. 527, 46 N.E. 454. The opinion appears to confuse ministerial and judicial acts; for under the law in question the Court had jurisdiction of all controversies, the recorder's power to register automatically being limited to claims not challenged within the time limited. But later statutes have avoided the difficulty by requiring that proceedings for initial registration must be conducted by the court, though subsequent proceedings may be carried on by the registrar. The Ohio law was said to take private property without due process of law, notice to adverse claimants not being subject to judicial scrutiny. *State v. Guilbert*, (1897) 56 Ohio St. 575, 47 N.E. 551.

⁴ The provisions of the Massachusetts Act, under which notice to claimants was by publication, posting on the land, and registered mail where address known, held not to violate due process clause, *Tyler v. The Judges*, (1900) 175 Mass. 71, 55 N.E. 812. A similar advanced view has been taken by the United States Supreme Court in a case not involving a Torrens law: *American Land Co. v. Zeiss*, (1911) 219 U.S. 47, 31 Sup. Ct. 200. The California Act is constitutional: *Robinson v. Kerrigan*, (1907) 151 Cal. 40, 90 Pac. 129. For other cases upholding constitutionality of Torrens Acts, see *State v. Westfall*, (1902) 85 Minn. 437, 89 N.W. 175; *People v. Crissman*, (1907) 41 Colo. 450, 92 Pac. 949; *People v. Simon*, (1898) 176 Ill. 165, 52 N.E. 910.

⁵ Amer. Bar. Assn. Reports, vol. xxxviii. 1055-66, vol. xl. 929-34. For text of Model Act prepared by Commissioners on Uniform State Laws, see U.S. Senate, 64th Cong., 1st Sess., Document No. 351.

⁶ A possible exception is in Illinois, where counties may adopt an Act making it the duty of executors and administrators to register land in their care: *Hurd's Rev. Stat. Ill.* 1915-16, pp. 626-627. But an election in which the voters of Cook County adopted the Act was declared invalid: *Harvey v. County of Cook*, (1906) 221 Ill. 76, 77 N.E. 424.

except in Oregon and Nebraska, subsequent withdrawal of the land from registration is not permitted.¹ The provisions for notice to claimants are substantially similar, consisting, generally, of personal service where parties can be found in the State by reasonable diligence, mailing to last-known place of residence, and in all cases publication in a newspaper of sufficient local circulation for a period varying in different States;² though in Massachusetts, Hawaii, and the Philippines publication, mailing, and posting notice of application in a conspicuous place on the land itself are sufficient without even attempting personal service—the Court, however, requiring proof of actual notice in proper instances.³ A decree entered by the Court is made binding on all the world, and the registered owner holds free from all claims not noted on his certificate of title except (1) liens and claims arising under United States laws, which the State cannot require to be registered; (2) short-term leases; (3) taxes or special assessments not had at the date of the certificate; (4) public highway land duly dedicated; (5) rights of action allowed by the Act; and, in some cases, existing easements and a few other classes of claims.⁴ A decree once entered can be opened only within a short fixed period, after which it becomes absolute.⁵ For the administration of the Acts, existing judicial machinery has generally been utilised, though Massachusetts has for nearly twenty years maintained a special land Court.⁶

With regard to the assurance fund provisions, however, there is considerable divergence among the American Acts. The ideal situation is to have the State, which guarantees the title and cuts off claims by constructive notice and an arbitrary period of limitation, also stand ready absolutely to indemnify claimants injured by mistakes of its officers. But only about half the States in which Torrens Acts are in force have adopted this principle;⁷ in the others, as well as under the Model Act, neither State nor country stands back of the assurance fund, and if the amount accumulated proves insufficient to satisfy judgments, the

¹ See Gen. Laws Ore. 1911, c. 276, and Neb. Act, s. 104, permitting withdrawal. Typical provisions forbidding it are: Cal. Act, s. 44; Ill. Act, s. 89.

² See e.g. Colo. Act, ss. 876–877; Miss. Act, ss. 6–7.

³ Mass. Act, ss. 29–31; Hawaiian Act, ss. 3161–3; Philippine Act, ss. 30–32. These provisions are “clearly within the well-established principles governing Bills to quiet title”: Niblack, *op. cit.* s. 35.

⁴ See e.g. Cal. Act, s. 34; Minn. Act, s. 6892.

⁵ See e.g. Colo. Act, s. 886; Hawaiian Act s. 3170; Ill. Act, s. 69; Minn. Act, s. 6893; Neb. Act, s. 26; Wash. Act, s. 8836.

⁶ Mass. Act, s. 1 *et seq.* and amendments. Similar provisions are found in Hawaii and the Philippines. Hawaiian Act, s. 3133 *et seq.*; Philippine Act, s. 1 *et seq.* Sir Robert Torrens considered the expense of a special Court unnecessary, and advocated reference of registration questions to the regular tribunals: Torrens, *op. cit.* 20. Unless the special Court can also be local, the delay, expense, and inconvenience render it undesirable. Niblack, *op. cit.* s. 29.

⁷ See e.g. Mass. Act, s. 98; No. Car. Act, s. 36; So. Car. Act, s. 36.

claimant must be content with collecting principal and interest from moneys subsequently accruing to the fund.¹

Torrens titles, owing to their security and consequent ready marketability, are becoming increasingly popular; and it seems only a question of time before registration of title will not only be encouraged by law in all American jurisdictions, but will become so nearly universal that the total abolition of the cumbersome recording system will be seriously contemplated. It must be admitted, however, that the greater initial cost of Torrens registration constitutes a serious barrier to its voluntary adoption which even the tremendously greater cheapness and facility of subsequent transactions do not wholly remove;² and on the remedying of this and other defects in the administrative provisions of existing laws the friends of the system would do well to concentrate their efforts.³

Legal Education in America.—Mr. Louis B. Wehle, of Louisville, made a somewhat novel contribution to the discussion of the development of legal education in an address which he lately delivered, at Philadelphia, before the Third National Conference on Universities and Public Service, since reprinted from the *American Law Review*. Mr. Wehle (writes Professor Courtney Kenny) is a zealous supporter of the growing drift of opinion towards a socialistic view of both economics and politics. And he accordingly desires to add to the present heavy labours of the Law Schools the further one of "infusing into our legal system a responsiveness to the evolution of thought under changing conditions"; or, as he elsewhere expresses it, the task of *socialising* the lawyers of the future.

He is clear that much is amiss with the lawyers of the present. "The influence of the Bench and Bar has steadily declined in America." By the great bulk of Americans "the lawyer is generally suspected and disliked. And he knows it." Nay, even "the lawyer's personal honesty in his profession is under widespread suspicion. According to Lord Bryce, this feeling against the lawyer was already strong a quarter of a century ago; it is undoubtedly more acute to-day."

Nor is Mr. Wehle less severe upon the bad system of law which

¹ See e.g. Minn. Act, s. 6944; Ohio Act, ss. 8572 *et seq.*; Va. Act, s. 87; Model Act, s. 87.

² Nebraska Pamphlet (see footnote¹ p. 282), pp. 39-48.

³ Pending New York amendments seek (1) to simplify court procedure, shortening the time and reducing the initial cost; (2) make searching and examination of titles exclusively official; (3) place the State or county back of the assurance fund. Hopper, *op. cit.* 59.

these bad lawyers have to administer. He desires to cure it of its "juridical misfits"; amongst which must be reckoned even the time-honoured institution of Trial by Jury, upon whose "unfortunate effect in America a treatise could be written."

The chief evils in the Anglo-American system he traces back—with a swifter logic than some of his readers may have at their command—into being "an inevitable result of the aloof scholasticism of the lawyers, which disables them from visualising concretely the working of the principles which they create." This supposed "social astigmatism of the lawyer" he proposes to cure by making the law-schools train their pupils into "a thorough grasp of sociology, economics, and legal history." Except from the initiative boldly taken a dozen years ago at North-Western University, under the influence of Dean Wigmore, even the leading American law-schools seem as yet to have done little in this direction. And even that little has been placed late in the student's course; and has been made an "elective" subject, which he may reject at his option. Mr. Wehle himself inclines to admit that the sociological foundation for a legal course would involve extending the accustomed three years of that course to four, and moreover must have its place as a part—and a compulsory part—of the beginning, not the termination, of these four years. For "the socialisation which the lawyer needs" must be wrought into his mind "in his youthful formative time." So bold a proposal will doubtless elicit widespread discussion amongst American law-teachers.

The Vicomte of Jersey.—The appointment by His Majesty under Letters Patent of Mr. E. T. Nicolle, a regular and valued contributor to the Review of Legislation for many years, to be Vicomte or Viscount of Jersey, provides an opportunity (a correspondent suggests) to give some particulars of the office.

"The office of Vicomte is very ancient, dating back to the days of Charlemagne. The Comtes were then Royal Officers with a county for their jurisdiction. The Vice-Comes or Vicomte was the lieutenant of the Comte. In Normandy the Comte was the Duke, and from the eleventh century the Norman Vicomtes were the representatives of the Comte or Duke, nominated by him and dispensing justice in his name. The Vicomte of Jersey was originally, and, up to the separation of the Channel Islands from Normandy in 1204, one of these Norman Vicomtes. When King John established the office

of Keeper (*Gardien*) of the Channel Islands a change was brought about. The system of balliwicks (*bailliages*) had already been created in Normandy with the view of centralising the Government, and this system was made to apply to the islands; Jersey and Guernsey each constituting a separate balliwick. The Vicomte was supplanted by the Bailiff (*Bailli*) named by the Keepers and he henceforth assumed a subordinate position amongst the Crown Officers.

“There are some curious anomalies about the office. The holder is High Sheriff, or Chief Executive Officer of the Royal Court; he is also Sergeant-at-Arms of the Jersey States, Coroner and Controller of Weights and Measures (he used also to be controller of markets, but the States bought up that right some years ago); he is the official trustee of estates left without a known owner, and is made a party to litigation to represent absent, non-represented parties and interests. He is a Crown Officer none the less, takes rank between the Attorney-General and Solicitor-General (to use the proper terms, ‘*Procureur du Roi*’ and ‘*Avocat du Roi*’); wears, as they do, robes of judicial scarlet; has, as they have, a separate pew in Court, at right angles to the seats of the Bench and Bar. He has a seat, too, in the States, but neither vote nor voice, whereas the Attorney-General and Solicitor-General have voices but no votes. He is also the presiding functionary in cases of local inquiries by *experts*, preliminary to the Court holding its sitting *in loco* in litigation affecting boundaries and easements of real properties. He presides, of course, at inquests, though the Attorney-General (or Solicitor-General), as representing public interests is necessarily present.”

Canadian Patriotic Fund.—The report of the Canadian Patriotic Fund established by Act of Parliament in August 1914, and generously supported by all sections of the community, shows that difficulties similar to those experienced in Great Britain are being dealt with in the Dominion. In particular may be mentioned the case of the soldier’s wife without children.

It is the policy of the Fund (says the Report) to encourage the young childless wife to support herself by her own industry, and it is not expected that a larger allowance than \$5.00 per month shall be paid to those young women whose marriage has been comparatively recent and who are unburdened by family ties. When, however, a childless wife is unable

to add to her income by her own efforts and has to maintain a home in anticipation of her husband's return, the maximum payable is increased to \$10.00. In this connection, it should be noted that when a woman has regular work, paid for on a weekly or monthly basis, she should be regarded as independent of the Fund. Casual earnings, however, may be ignored.

The Fund has power to deal with the dependants of men in the Allied Forces and special arrangements have been made for the treatment of Italian Reservists. Without the assistance provided by the Fund it would have been almost impossible for some of the men now on active service in Flanders to have left their homes, and the substantial sum at its disposal is one more piece of evidence of the enthusiastic and energetic manner in which Canada has assumed her responsibilities and taken her part on the side of law and order.

The Unity of the Empire.—In the *Law Quarterly Review* for July,¹ Professor J. H. Morgan discusses "The War and the Empire." He says: "This war has brought into bold relief the unity of the Empire both legally and politically. I say legally because the war has reminded us of a fact which one or two Colonial statesmen seemed at one time inclined to forget, namely, that however autonomous our great Dominions may be, it is still the prerogative of the Crown and the Crown alone to make war. From the moment the King's proclamation was issued, not only the United Kingdom but also the Dominions were at war." Professor Morgan draws attention to the process of integration going on within the Empire, and asks "Can we contemplate a polity in which these great unions and federations, Canada, South Africa, Australia, the United Kingdom, are themselves federated?" He sees the solution "not in a Federal Parliament, but in a Federal Council."

Sir Charles Bruce's Recollections.—We are glad to record the publication of Sir Charles Bruce's interesting volume,² in which he traces back for many centuries the history of the family to which he belongs before he deals with his long educational service and administrative work in the East and West from 1868 to his retirement in 1904. Born in 1836, Sir Charles Bruce was educated at Harrow and Tübingen.

¹ Vol. xxxiii. No. 131, pp. 214-35.

² *Milestones on My Long Journey: Memories of a Colonial Governor.* By Sir Charles Bruce, G.C.M.G. (Maclehose).

gen ; he became in 1865 professor of Sanskrit at King's College, London ; in 1868 Rector of the Royal College, Mauritius ; in 1878 Director of Public Instruction in Ceylon. He took up administrative work in Ceylon in 1883, became Lieutenant-Governor of British Guiana in 1885, later Governor of the Windward Islands, and in 1897 Governor of Mauritius. His labours have been arduous in the service of the Empire.

An International Court of Justice.—The American Society for the Judicial Settlement of International Disputes has published (No. 29, May 1917) a speech of Mr. James Brown Scott, delivered in January 1917 at the Havana Session of the American Institute of International Law. He said that an International Court of Justice had been approved by the Second Hague Peace Conference, the Institute of International Law, and the American Institute of International Law, that Germany, France, Great Britain, and the United States had in 1910 signed an agreement pledging themselves to found such a Court, and that Holland in 1914, on the eve of the Great War, had agreed that the Hague should be the seat of the Court, and had agreed also to invite the leading Powers to collaborate with it in establishing the Court before the Third Conference called to meet in 1914. Mr. Scott, in pleading for the establishment of the Court with trained international lawyers as judges appointed for the period of twelve years, suggested that the Supreme Court of the United States, which in settling on a judicial basis the disputes between States of the Union, had had the experience of a full century, should be the model for a Supreme Court of the society of nations. This Court has not the power to enforce the presence of nor to execute by force its judgment against a defendant State, yet it is found in practice that a defendant State in most cases has appeared and submitted to judgment. Mr. Scott adds the view: "a decent respect to the opinions of mankind has sufficed for the United States ; a decent respect to the opinions of mankind will be found a sufficient sanction in other countries." Mr. Scott feels that this view is supported by the fact that all the parties to the present war have appealed to neutrals "to convince public opinion of the justice of their cause." "Unfortunately," writes a correspondent, "the course of action of Germany both before and during the war negatives Mr. Scott's interesting conclusions. Every one desires an International Court of Justice, but how could such a Court have dealt

with Germany when she openly flouted the very bases of ordered Society? After the war we must have an International Court of Justice with both civil and criminal jurisdiction. The ultimate sanction of it will be the public opinion of the nations that form it, but there must be also, if possible, an administrative sanction which can enforce its judgments as well as declare its laws."

The Sale of the Journal.—The last number of the Journal containing the Review of Legislation can be supplied only to subscribers. A price was placed on the cover in error. The present number can be supplied through any bookseller for six shillings.

Back Numbers of the Journal.—The Hon. Secretary will be very glad to hear from members of the Society who have back numbers of the Journal for which they have no further use. In particular he desires to obtain copies of No. XXXVI.

Annual Report for 1916.—The publication of the financial statement has been delayed owing to the difficulties of the present time. It shows, however, that the support of the Society has been maintained and that the decision of the Committee to supply the Journal only to members of the Society has caused a substantial increase in the income from individual subscribers. On the other hand there is a considerable decrease in the amount received from sales.

Having regard to the developed sense of Imperial Unity it is hoped that the unique work of the Society will receive increasing recognition, and that, in spite of many other claims, members will make known its objects to others likely to appreciate the work, which has been carried on for nearly a quarter of a century. It is obvious that an income of little more than £500 per annum is inadequate if the Society is to fulfil its object of recording the course of Legislation, its development and working, in all parts of the British Empire, as compared with the laws of foreign countries.

The reason for the balance at the end of the year 1916 being larger than its predecessor is that the account for the second number of the Journal issued in 1916 was not paid until 1917. But a larger balance is necessary to meet the increased expenditure in the production of the Journal. The cost of printing the Journal has been substantially increased and is still increasing.

The subscribing Governments have continued their financial

support and their Law Officers have in many cases rendered valuable assistance in making more complete the annual review of legislation. During the year the Editors received the cordial and voluntary co-operation of more than eighty contributors, among whom may be mentioned the Hon. J. Castberg, President of the Norwegian Odelsting; the Hon. Littleton E. Groom, the Australian Commonwealth Minister of Defence; Baron Heyking, then Russian Consul-General; Dr. Blake Odgers; the Right Hon. R. E. Prothero, President of the Board of Agriculture; M. Renault, Mr. Justice Rowlatt, Sir Charles Tarring, Sir E. J. Trevelyan, besides others who have for years been associated with the work of the Society.

With a view to widening still further the range of contributors the Committee decided to obtain the assistance of correspondents in the Universities of the Empire. Professor Jethro Brown (Adelaide), Sir Ludovic Grant (Edinburgh), Professor Lee (McGill), Professor McDougall (Hobart), Professor McKechnie (Glasgow), and Sir Erle Richards (Oxford) had kindly consented to act in that capacity, but developments of the Committee's intentions have been held in abeyance owing to the war. Sir Erle Richards has been appointed a member of the Council.

The war has also been an obstacle to the expression in some definite form of the desire for establishing closer relations with the French Society of Comparative Legislation. But the Committee have intimated that they are anxious to participate in any possible way in combined action. This opportunity may be taken to express our sympathy in the great losses which our French colleagues have sustained and our trust that the years of strain and suffering may be brought to a peaceful and durable conclusion.

Although not falling within the year 1916, the resignation of Mr. Manson as Honorary Secretary cannot be passed over without a preliminary reference to the loss which the Society has thereby sustained and to the gratitude which the Committee feel for the invaluable services rendered by him in that capacity.

C. P. ILBERT,

Chairman of Executive Committee.

ABSTRACT OF RECEIPTS AND PAYMENTS FOR THE YEAR TO
DECEMBER 31, 1916.

RECEIPTS.

	£	s.	d.	£	s.	d.
To Balance in hand at January 1, 1916				157	1	7
„ Amount of arrears collected in 1916				47	2	11
„ Amounts received for current year from :						
(a) Law Society	21	0	0			
Lincoln's Inn	21	0	0			
Gray's Inn	10	10	0			
London Chamber of Commerce	5	5	0			
Royal Colonial Institute	5	5	0			
(b) Government Grants :						
1. His Majesty's Treasury	25	0	0			
2. British Possessions	193	3	11			
(c) Subscriptions	243	14	11			
				524	18	10
„ Sales				54	3	9
„ Subscriptions in advance				6	6	0
				<u>£789</u>	<u>13</u>	<u>1</u>

PAYMENTS.

	£	s.	d.	£	s.	d.
By Publishing No. XXXV	167	13	6			
„ Editorial Fee to Assistant Editor	45	0	0			
„ Purchase of back Numbers of Journal	37	0	0			
„ Fees for Articles	18	16	0			
„ Petty expenses, including postage, typewriting, etc.	17	1	10			
„ Honorarium to acting Assistant Secretary	15	0	0			
„ Advertising	13	11	0			
„ Rent of Chambers	10	0	0			
„ Miscellaneous Printing and Stationery	8	8	6			
„ Subscriptions in advance	6	6	0			
Balance in hand at December 31st, 1916	450	16	3			
	<u>£789</u>	<u>13</u>	<u>1</u>			

REVIEWS.

TREATIES OF PEACE.

DR. COLEMAN PHILLIPSON, whose researches in the field of international law are already known and valued, has brought together in a comprehensive volume¹ the rules of law and diplomatic practice bearing upon the conclusion of hostilities. The first, and by far the shorter, part of the book deals with the termination of war by reciprocal intermission, or by the conquest and subjugation of one of the belligerents; the second part deals fully with treaties of peace. Among the questions discussed in the first part of the book, premature annexation, with special reference to the South African War, and the difficult subject of State succession in the absence of a treaty, are of great interest. In the following chapters the writer conducts the reader through all the stages from the inception of peace negotiations to the ratification of the final treaty. He discusses, with a wealth of illustration, armistices, the interposition of third States, whether by intervention or good offices or mediation, the preliminaries of peace, the constitution of the peace conference and its procedure, the treaty-making power, ratification, and the language and interpretation of treaties. Of special interest to an international lawyer is the consideration of the date from which a peace treaty becomes operative in the absence of special stipulation.

Dr. Coleman Phillipson then proceeds to a full examination of the main clauses generally to be found in a treaty of peace—the restoration of territory and property, the return of prisoners, amnesty, the revival or abrogation of previous treaties, indemnity, and the cession of territory. In the three concluding chapters of the book, he investigates the problems created by cession with regard to nationality, public law and administration, State property, public debts and private rights.

The book contains a convenient appendix of actual treaties, ranging from the Treaty of Paris of 1815 to the Treaty of Athens of November 1913, and is admirably equipped for ready reference.

Dr. Coleman Phillipson's work supplies evidence of careful and far-reaching research, not only in the recognised books on international

¹ *Termination of War and Treaties of Peace.* By Coleman Phillipson, M.A., LL.D., Litt. D. (London: T. Fisher Unwin, Ltd. 21s. net.)

law, but among the detailed and not too familiar records, both official and unofficial, of important peace congresses ; his handling of the material shows thorough knowledge and calm judgment. Although much of the matter can be found in available text-books, Dr. Coleman Phillipson justly claims that he has for the first time expounded it in a systematic and comprehensive manner and co-ordinated it within reasonable compass. For all these reasons the book is a valuable addition to the science and the literature of international law.

R. F. R.

“ NECESSITY KNOWS NO LAW ” : THE BELGIAN CASE.¹

WHEN Germany, at the beginning of August 1914, violated the neutrality of Belgium, which she had guaranteed, the German Chancellor, in the Reichstag, admitted the act to be contrary to international law. “ Necessity knows no law. We were compelled to override the just protest of the Luxembourg and Belgian Governments. This wrong—I speak frankly—we will endeavour to make good.” His argument had no pretence to be any sort of juridical justification. Subsequently the Germans made some statements by way of justification, but the admission that Germany invaded Belgium to secure strategic advantages remains on record. The object of this work by a Belgian Professor of Law is to expose the unsoundness of the German arguments based on special pleading, casuistry, quibbling, sophistries. It is avowedly a brief for Belgium. It summarises each point urged by the Germans, and supplies the Belgian answer. Assuming that the German case has been completely stated, the reader can easily decide where the right and wrong lie. Thus it is clear that, despite the German contentions, Belgium is a neutral State, permanently neutralised by Treaties which Prussia guaranteed ; that the German Empire took over the guarantee ; that Belgium did not violate the obligations of permanent neutrality ; that the Treaties were not obsolete ; that the Treaties applied to the circumstances of 1914 ; that Belgium, though a neutral State, was justified in defending herself and fighting Germany. Some of the German contentions emanate from German jurists, such as, for instance, that the provisions of the Hague Convention are without obligatory force in the present war. On the other hand, it was the German Government who relied, for their defence, on certain documents found at Brussels, which contained an exchange of opinions between

¹ *The Belgian Case : A Juridical Enquiry.* By Ch. de Visscher, Professor of Law in Ghent University. Translated by E. F. Jourdain, Oxford. Preface by J. Van Den Heuvel, Minister of State, Belgian Minister to the Holy See. (Hodder & Stoughton, 1916.)

Belgium and British officers of no legal value. Altogether, the German defence cannot be considered sincere, nor, it may be anticipated, will it be accepted by neutral international lawyers.

C. E. BUCKLAND.

THE NATIVES OF SIERRA LEONE.

THE results of Mr. Thomas's investigations regarding the manners and customs of the natives of Sierra Leone are presented in Vol. I. of a Government Report, which makes an interesting volume.¹

It is satisfactory to find that Mr. Thomas has so clearly realised the fundamental fact that native manners and customs cannot be adequately studied without a good knowledge of the native languages. He has, we are glad to see, spent a good deal of his time in learning the languages of Sierra Leone; the mass of linguistic information which he has collected fills Vols. II. and III. of the Report and the volume of "Specimens." The results of this work cannot fail to be of great interest to linguists in general as well as to those connected with Sierra Leone.

The books deal mainly with the Timne language. This Mr. Thomas has recorded and analysed (both phonetically and grammatically) in considerable detail. He also gives a considerable amount of information, though mostly of a less detailed character, regarding more than twenty other languages. He has, moreover, brought home a large collection of phonographic records illustrating several of the languages.

Mr. Thomas has not shirked the difficult task of analysing the speech-sounds of the languages, and devising an unambiguous method of representing them in writing. For the latter purpose he has adopted in the main the principle of supplementing the ordinary Roman letters by diacritical marks. Though his system conveys the required information, we could have wished that he had followed throughout (as he has done in the case of two or three sounds) the principle now recommended by our foremost authorities on methods of language teaching, viz. that of using *new letters* for sounds which cannot be adequately represented by means of the Roman alphabet.

We are particularly glad to find that whenever Mr. Thomas has occasion to quote native names or words in the course of his report, he writes them in their phonetic spelling, instead of making the usual clumsy attempts at "romanising."

To judge of the accuracy of the work would require a detailed know-

¹ *Anthropological Report on Sierra Leone*. By N. W. Thomas. Vol. I., *Law and Custom of the Timne and other Tribes*. Vol. II., *Timne-English Dictionary*. Vol. III., *Timne Grammar and Stories*. (Harrison & Sons, 1916.)—*Specimens of Languages from Sierra Leone*. By N. W. Thomas. (Harrison & Sons, 1916.)

ledge of these languages which few, if any, possess. The minuteness of the phonetic and grammatical analysis gives us, however, the impression of careful and accurate work.

We therefore commend the books to all those who are interested in the welfare of West Africa.

D. J.

THE PUNJAB AND NORTH-WEST FRONTIER CODE.

THE Punjab was annexed to British India in 1849: the North-West Frontier Province was created in 1901, and comprises, as the *Imperial Gazetteer* states, certain Districts which were detached from the Punjab in order that the Government of India might exercise more direct control over the frontier questions to which they give rise, with a number of adjoining border tracts over which our direct influence has been extended since 1892. Thus the Punjab was the frontier province on the north-west of India until the new Frontier Province was carved out of it. The Punjab has had a Legislative Council since 1898: the new Frontier Province has no Council, but laws are made for it by the Governor-General in Council by the name of Regulations, under the Statute of 1870, 33 Vict. c. 3, which affords the machinery of legislation for the less advanced portions of India. As their history and geography have determined the scope of legislation for other parts of India, so the facts above stated indicate the scope of the laws passed for the Punjab and the Frontier Province. A new edition of the Codes of those territories respectively ¹ contains the Enactments locally in force therein. It does not purport to reproduce the general Acts of the Governor-General's Legislature, which are collected in the volumes of the general Acts applicable to all India (such as the Penal Code). The laws now reproduced are divided into Parts in this volume according to the legislature passing them and the territories affected. This edition shows for the first time separately the Acts passed by (a) the Supreme Legislature and (b) the Punjab Legislative Council, which are in force *only* in the new Frontier Province. It is surprising to find some of the old Regulations of (Lower) Bengal passed before 1834, and Acts passed for Bengal only, in force in the Punjab, though not generally in India.

C. E. BUCKLAND.

¹ *The Punjab and North-West Frontier Code*. Fourth Edition. (Calcutta: Superintendent Government Printing, India. 6 rupees = 9s.)

NEW ZEALAND WAR LEGISLATION.

THIS *Manual of the War Legislation of New Zealand*¹ has been compiled under the direction of the Hon. A. L. Herdman, Attorney-General for New Zealand, by Mr. James Christie, of the Crown Law Office, and may therefore be accepted as an official publication. It consists, as the sub-title states, of Acts of Parliament, Proclamations, Orders in Council, and other instruments passed, issued, and made in consequence of the war and in force on September 30, 1916. Acts of Parliament still in force are grouped in Part I. according to their subject, and not in chronological order, as with our manuals of Emergency Legislation, whilst those enactments which are spent are to be found in the Appendix. Proclamations, Orders in Council, etc., are contained in Part II., following the same order of arrangement as those statutes in Part I. by virtue of which they were issued. Those Proclamations, Orders in Council, etc., issued by the Government of New Zealand under its own constitutional powers, but not issued under the authority conferred by the statutes in Part I., comprise Part III., whilst Part IV. embodies all the Royal Proclamations, Orders in Council, etc., of the Crown, and published by direction in New Zealand. A chronological table of all these statutes, proclamations, Orders in Council, etc., is given in an appendix, thus combining the advantages of subject grouping and chronological order.

The documents are well annotated and cross-references are given whenever necessary.

Mr. Christie has performed his task with that care and mastery of the subject with which we have come to associate official publications from New Zealand.

H. H. L. B.

LORD STOWELL.

A LIFE of Lord Stowell² is very welcome at the present time, and comes most appropriately from the pen of the learned editor of *English Prize Cases*. The only previously existing modern biographies of this great English jurist were Lord Brougham's short account, Mr. Norman Bentwich's excellent sketch in *The Great Jurists of the World* and the short article in the *Dictionary of National Biography*; both, however, insuffi-

¹ *Manual of the War Legislation of New Zealand*. Compiled by direction of the Hon. A. L. Herdman, H.M. Attorney-General for New Zealand, by James Christie, LL.M. (Wellington, N.Z. By authority: Marcus F. Marks, Government Printer, 1916.)

² *Lord Stowell, His Life and the Development of English Prize Law*. By E. S. Roscoe, Registrar of the Prize Court of Great Britain and Ireland. (London: Constable & Co., 1916.)

cient to satisfy the renewed and extended interest in Stowell's personality and judicial work that has resulted from the Great War. Unfortunately but few details of his personal life still remain, but Mr. Roscoe has carefully collected the available material and now presents us with a very distinct impression of Stowell as a man, together with a critical appreciation of the results of his labours as a judge and international jurist.

This little volume is not, of course, a treatise on prize law, and should enjoy a wide circle of general readers, but the learned author has necessarily to consider many points of great interest to the international lawyer. The first two chapters are biographical. Then, after a brief but illuminating sketch of the nature of the jurisdiction exercised by the Prize Court in the eighteenth century, and a consideration of Stowell's judicial work and its results, with some illustrative judgments, Mr. Roscoe proceeds to discuss the position of Stowell case law in regard to the Declaration of London and the prize law of the present war, and concludes with a short survey of Stowell's achievements as a judge under the instance or civil jurisdiction of the High Court of Admiralty. An engraving from the portrait of Lord Stowell by Thomas Phillips at Corpus Christi College, Oxford, forms a pleasing frontispiece to the book, while the appendices include extracts from the Memorandum presented to the United States Government by the British Ambassador in Washington, April 24, 1916, and a list of Stowell's principal prize decisions in chronological order.

When Stowell took his seat in the Prize Court at the end of October 1798, "nothing in the nature of a series of judicial precedents having the validity of a legal code was to be found—there was a chaotic collection of law, the usefulness of which was slight." There can be no question that he honestly and sincerely endeavoured to administer solely the "justice which the law of nations holds out without distinction to independent States." But, in many prize matters, there could not be said to be anything even approaching uniformity of international practice. The Prize Courts of all countries administer international law according to their own special traditions, and Lord Stowell was no exception. The law which that great judge created was, strictly speaking, simply a branch of English municipal law. But for him "there would never have been that sharp difference between the clear and definite body of English prize law and the unsystematic and indefinite collection of administrative decrees, decisions, and academic opinions which constitute continental prize law."

Mr. Roscoe duly notes the conflict between the *belli rigor* and the *commerciorum libertas* in regard to the competing interests of belligerents and neutrals. There is also the question, as exemplified by the attitude of Germany at the London Naval Conference and at the meeting of the

Institute of International Law at Oxford in 1913, of the conflicting interests of belligerents differently situated geographically or economically, or of varying degrees of maritime strength. Mr. Roscoe contends that supersession of the Stowell case law is a condition precedent to the work of an international Court of Appeal, and, in view of the present authoritative position of that law, he concludes that such a Court of Appeal for prize cases is outside the range of possibility. The course of the present struggle has demonstrated the inadequacy of some of the provisions of the Declaration of London to protect the interests of a great naval Power under the conditions of modern warfare, but if the Declaration is carefully examined it will be found to consist, to a very large extent, of the rules of British prize law as understood at the commencement of the present century.

The eminent American jurisconsult, Justice Story, wrote of Stowell's judgments: "I have taken care that they shall form the basis of the maritime law of the United States, and I have no hesitation in saying that they ought to do so in that of every civilised country in the world." Little popular as those judgments were at the time in the New World, they have since been recognised as authoritative by America, when belligerent, and many of the rules that Stowell laid down have already passed into the law of nations. While it may confidently be anticipated that, so long as wars are possible, public opinion in this country will never consent to surrender any of the maritime rights conferred by the existing law, there appears to be no reason why the general body of neutral States should not recognise that those rights, as exercised by Great Britain and her Allies in accordance with the principles of elementary justice and humanity, are essential to the conduct of naval warfare. A series of judicial precedents has undoubtedly many points of superiority, as an effective legal instrument, over a mere fixed code. But we live in an age of legislation and codification, and M. Renault's great work may yet serve as a basis for the negotiation of a conventional system of international prize law, founded upon and in continuation of the noble judicial code created by Lord Stowell, and ultimately applied and developed by a truly international Prize Court.

H. R. P.

THE ELEMENTS OF JURISPRUDENCE.

SIR WILLIAM BLACKSTONE went on for many years improving and correcting his immortal work, and the same admirable process has occupied much of the busy leisure of Sir Thomas Holland in regard to the classic¹ that he gave to the world seven-and-thirty years ago. *The Elements of*

¹ *The Elements of Jurisprudence*. By Thomas Erskine Holland, K.C. Twelfth Edition. (Oxford: at the Clarendon Press. 10s. 6d. net.)

Jurisprudence has now reached its twelfth and, for all final purposes of theory, its definitive edition. Professor Holland tells that he "has aimed at producing a text which may be regarded as practically final, although future issues of the work may be illustrated by annotations chronicling the movement of legislation and case-law, British and foreign." The final revision has been thorough. It has "required an expenditure of time and labour exceeding, probably, that demanded by any preceding new edition" and includes the addition of "a considerable amount of new matter . . . suggested to the author by the gigantic struggle now in progress." There is one point on the question of neutrality on which, despite the practice of the present war, Sir Thomas is, and is rightly, obdurate. He declares (*pace* most other writers) that there cannot be in international law any "direct relation between a belligerent State and the individual subjects of a neutral State." The existence of "the Black List" seems to militate against this conclusion. On the other hand, it may be said that the publication of a Black List is an intimation to the Government of neutral traders mentioned in the list that all trade is prohibited with these traders. It is not proposed here, in recording the publication of this definitive edition, to open up the broad questions of principle as to the nature of law that Professor Holland has laid down, and which have so long been accepted. But this may be said: "the epoch ends," not in the sense that Matthew Arnold describes, but it ends, and we have a Pisgah vision of a new era which must begin after the war. Sir Thomas Holland's final words as to the nature of law come at a moment when a great Power has ostentatiously disclaimed the very existence of law as a force binding the consciences of men and nations. The disclaimer has awakened a sleeping world to arms, and this gigantic conflict is being fought not only to establish on an indubitable basis the rights of men, but also the fact that law is a real possession of the human soul for the safeguarding of which most nations are willing to put all hazards to the touch. It has been suggested, and the uprising of the world in defence of righteousness is given as evidence of the fact, that orderliness is as essentially inherent in consciousness as in matter. Comte closed the door on further progress in astronomy immediately before the invention of the spectroscope. It may be that this definitive edition of a great work is the end of a chapter only in our progress towards the ascertainment of the basis of law.

J. E. G. de M.

CONTRACTUAL CAPACITY IN PRIVATE INTERNATIONAL LAW.

DR. CHENG's little volume,¹ being the thesis of the author approved for the degree of Doctor of Laws in the University of London, is well worth the attention of all who are interested in Private International Law as an erudite and well-reasoned analysis of the rules laid down by English Courts on a difficult question of that branch of law. The arrangement of the work is clear and logical, and the concluding chapter summarises admirably the points discussed in it. The author emphasises the importance of Private International Law as a law of which the development is a sound proof of the progress and prosperity of a nation. No doubt the most important branch is the part which deals with the question of capacity to act. He defines "capacity to act" as "the legal qualification independent of contract, but absolutely conferred by law on a person as an average member of the community to enter into legal relations binding on himself without the interference of others." He distinguishes capacity from rights, which are the correlations of legal duties, and incapacity from illegality, which is a prohibition of universal application and not addressed to one class only. He rejects the distinction sometimes drawn between general and particular incapacities, *i.e.* to enter into some particular relation only, as arbitrary and groundless; and he would treat incapacities of status which are not enforced in English law as foreign and unknown to our institutions rather than as particular incapacities or modified status. The author disputes the theory that laws regarding the capacity of a person are ubiquitous, *i.e.* have the same force everywhere as "personal statutes," regarding this as "mediæval," for no nation, unless bound by treaty, is obliged to give full recognition to any branch of law of another, and in practice the Continental codes expressly make reservations in applying them in favour of their own rules of public order and morals, while our own law will not admit a foreign status if repugnant to our conceptions of religion or morality or if penal or if unknown to our law. He points out at the same time that the application of foreign laws to determine the question of capacity does not necessarily prejudice our own citizens' interests, and that it is moreover a distinct matter from admitting a foreign jurisdiction over the particular case, which may be exercised by any Court, for it is always the law of the Court invoked which governs the case and which decides what law it will adopt in the particular instance. If the foreign law is applied that fact is due to the local law: but injustice must not be done to the subjects of another country, nor must a two-sided standard be adopted—with the object of favouring the home subject by applying now one law now another—such as that

¹ *The Rules of Private International Law determining Capacity to Contract.* By F. T. Cheng, LL.D. (London), of the Middle Temple, Barrister-at-Law (London, 1916).

suggested in the famous decision of the Supreme Court of Louisiana in *Saul v. His Creditors*. The author differentiates capacity to make business contracts, capacity to make contracts relating to immovables, and capacity to make other contracts. He discusses specially the question of capacity to marry, and concludes from an examination of our judicial decisions that it is not a contract proper, but a status brought about by a contract (the mutual promise to marry) and is therefore not subject to the rule applicable to capacity for entering into contracts, and that the governing law is now the *lex loci celebrationis* as decided in the earlier cases and not the *lex domicilii* which till recently had been taken as the established rule.

One criticism which suggests itself is that the author ignores the fact that for two centuries the current of juristic opinion has steadily set in the direction of establishing one law as proper to govern the legal status of the individual, and that in recent times the selection of that law has been made binding on most of the Continental European States by the Hague Private International Law Conventions dealing with specific branches of that law, such as marriage, guardianship, etc. There are of course two aspects of the rules of Private International Law, the one regarding them as something apart from municipal laws being an ideal system recognised more or less by them, the other view considering them as actually part of each municipal law which can accordingly conceive them as it thinks proper for itself. These two points of view are not necessarily conflicting; they rather serve to supplement and reinforce each other, and there is no need to over-emphasise either. Every municipal court is sovereign over its own area of jurisdiction, and any law which it chooses to apply becomes thereby its own. But practice no less than theory has shown that for most purposes one law is appropriately applied to govern the status of individuals, and the absurdity of a man changing his personal law with every frontier that he crosses can be avoided, provided that in certain circumstances in which its application would be inequitable it will make way for the domestic law. In this sense there is still a recognised personal law which follows the person everywhere. Our jurisprudence arrived later than the Continental at this conclusion, which explains why we apply the *lex loci actus* in the earlier cases, but for a considerable time past the personal law has been recognised in our law.

Another point which calls for remark as perhaps over-elaborated is the author's treatment of the term "capacity to contract." His analysis of the judicial decisions does good service in directing attention to the want of clearness of thought often shown in the use of the phrase, in which he points out that incapacity is often treated as equivalent to illegality which is based on prohibition, *e.g.* to marry within the prohibited degrees of marriage is not confined to a class of persons, but is universal. Judged by the definition quoted above, incapacity is not

appropriately applied to the effect of such a general prohibition, as a whole ; but as regards the individual it has a definite everyday meaning that, whatever the extent of its application may be, it has a direct personal effect on the individual, which seems to be more clearly appropriate when his personal status is in question than the impersonal term " illegality," which only means conduct inconsistent with the policy of the country, without any indication of the reason for its use.

These criticisms, however, are not intended to disparage the many merits of this work, which reflects high credit on its author, who is not the first representative of his country to make a valuable contribution to legal literature ; and it is especially welcome for the fresh light which it throws on the problems presented by the conflict between the laws of the different countries in the various departments of family law.

G. G. P.

RULES OF THE SUPREME COURT.

MR. SAMUEL ROSENBAUM is an American lawyer. He spent two years in this country in order to study our system of civil procedure. He embodied the result in articles which were published in the *University of Pennsylvania Law Review*, the *Law Quarterly*, and other legal reviews, and the book now under review¹ is a reproduction in an improved form of these articles. Mr. Rosenbaum appears to have had two objects in view, first to trace the history and development of the English civil procedure and rule-making authorities as they exist under the Judicature Acts and the Rules of the Supreme Court, and secondly to show that rules of practice and procedure are better made by a professional body such as the English Rule Committee than by the legislature.

The greater part of the book is naturally taken up with the first object. It starts with an interesting and instructive account of the circumstances which led up to the passing of the Judicature Acts, and several chapters are devoted to the history of the Rules made under those Acts. The schedules to the Acts themselves are discussed and the revisions of 1883 and the Rules of 1885, 1893, and 1902 are fully dealt with. Chapters are added as to Rules to counteract decisions, Rules creating new procedure, Rules under specific statutes and administrative Rules, and also as to Rule-making in the County Courts and in the Courts of the Empire. Mr. Rosenbaum appears to have studied all the relevant current legal literature, and has collected and lays before his readers much information which would otherwise remain scattered. He shows the reason for

¹ *The Rule-making Authority in the English Supreme Court.* By Samuel Rosenbaum, LL.M., with an introductory Preface by T. Willes Chitty. (Boston Book Company, 1917.)

each of the more important changes and amendments and his statements appear to be accurate and to the point.

In dealing with the second object Mr. Rosenbaum points out the marked difference which exists between the method adopted in this country with regard to the making of rules of procedure and that adopted in the United States. In this country the rules are made by a professional body. In the United States they are made by the legislature. Historically he suggests that the difference has arisen from the fact that in this country the Courts are the Courts of the King, whereas in the States they are the Courts of the people. He contrasts the two systems and concludes, rightly, that the former is undoubtedly the better. The facts that the Rule-making efforts of the English Rule Committee have not always been successful and that improvements might be made in the constitution of that body do not detract from its merits as a system.

It is pleasant to be told that the best American lawyers are beginning to take an interest in the importance of logical modifications in their system of civil procedure. There is reason to believe that a similar interest is reviving in England. The Revision Rules published in April 1917 are a first instalment of this interest, and will, it is to be hoped, be followed in further instalments by a complete revision of the rules so as to render them complete, consistent, and up to date.

To any one who takes an interest in the subject, Mr. Rosenbaum's book will be of great assistance. It is written in an interesting style, and shows the result of much painstaking research and labour, and a practical detailed and accurate knowledge of the English procedure.

T. W. C.



